CRIMINAL YEAR SEMINAR

April 20, 2018- Tucson, Arizona
May 11, 2018 - Phoenix, Arizona
May 18, 2018 - Chandler, Arizona

EVIDENCE UPDATE

Presented By:

The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court

&

Jonathan Mosher
Chief Trial Counsel, Pima County Attorney's Office

Distributed By:

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CITES 2017 Alphabetically

Bobrow v. Bobrow, 241 Ariz. 763, 391 P.3d 646 (Ct. App. 2017).
Boswell v. Fintelmann, 242 Ariz. 52, 392 P.3d 496 (Ct. App. 2017).
Brailsford v. Foster, 242 Ariz. 77, 393 P.3d 138 (Ct. App. 2017).
Cespedes v. Lee, 243 Ariz. 46, 401 P.3d 995 (2017).
Chantry v. Astrowsky, 242 Ariz. 355, 395 P.3d 1114 (Ct. App. 2017).
Crosby-Garbotz v. Fell, 2017WL6629521 (Ct. App. 2017).
Fitzgerald v. Myers, 243 Ariz. 84, 402 P.3d 442 (2017).
In re Hardt, 242 Ariz. 449, 397 P.3d 1049 (Ct. App. 2017).
In re Jessie T., 242 Ariz. 556, 399 P.3d 103 (Ct. App. 2017).
Nia v. Nia, 242 Ariz. 419, 396 P.3d 1099 (Ct. App. 2017).
Passmore v. McCarver, 242 Ariz. 288, 395 P.3d 297 (Ct. App. 2017).
Phillips v. O'Neil, 243 Ariz. 299, 407 P.3d 71 (2017).
Phoenix City Atty. v. Nyquist, 243 Ariz. 227, 404 P.3d 255 (Ct. App. 2017).
Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572 (2017).
Robert W. Baird v. Whitten, 2017WL4296583 (Ct. App. 2017).
Romero v. Hasan, 241 Ariz. 385, 388 P.3d 22 (Ct. App. 2017).
Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330 (Ct. App. 2017), ***rev. granted***.
Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232 (2017).
Simpson v. Miller, 241 Ariz. 341, 387 P.3d 1270 (2017).
Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579 (2017).
Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76 (Ct. App. 2017).
State v. Burbey, 243 Ariz. 145, 403 P.3d 145 (2017).
State v. Carson, 243 Ariz. 463, 410 P.3d 1230 (2018).
State v. Chandler, 2017WL6350128 (Ct. App. 2017).d
State v. Chavez, 243 Ariz. 313, 407 P.3d 85 (Ct. App. 2017).
State v. Clow, 242 Ariz. 68, 392 P.3d 512 (Ct. App. 2017).
State v. Dean, 241 Ariz. 387, 388 P.3d 24 (Ct. App. 2017).
State v. Dickinson, 242 Ariz. 120, 393 P.3d 461 (Ct. App. 2017).
State v. Dodd, 2017WL6327542 (Ct. App. 2017).
State v. Escalante, 242 Ariz. 375, 396 P.3d 611 (Ct. App. 2017), ***rev. granted***.
State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798 (2017).
State v. Farnsworth, 241 Ariz. 486, 389 P.3d 88 (Ct. App. 2017).
State v. Fell (Lietzau), 242 Ariz. 134, 393 P.3d 475 (Ct. App. 2017).
State v. Fischer, 242 Ariz. 44, 392 P.3d 488 (2017).
State v. Francis, 243 Ariz. 434, 410 P.3d 416 (2018).
State v. Gill, 241 Ariz. 770, 391 P.3d 1193 (2017).
State v. Godoy (Whitney), 2017WL4250136 (Ct. App. 2017).
State v. Grijalva, 242 Ariz. 72, 392 P.3d 516 (Ct. App. 2017).
State v. Gulley, 242 Ariz. 149, 393 P.3d 929 (2017).
State v. Gulli, 241 Ariz. 787, 391 P.3d 1210 (Ct. App. 2017).
State v. Haskie, 242 Ariz. 582, 399 P.3d 657 (2017).
State v. Havatone, 241 Ariz. 506, 389 P.3d 1251 (2017).
State v. Hegyi (Rasmussen), 242 Ariz. 415, 396 P.3d 1095 (2017).
State v. Hernandez, 242 Ariz. 568, 399 P.3d 115 (Ct. App. 2017), ***rev. granted***.
State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783 (2017).
State v. Jacobson, 2017WL6523707 (Ct. App. 2017)).
State v. James, 242 Ariz. 126, 393 P.3d 467 (Ct. App. 2017).
State v. Johnson, 243 Ariz. 41, 401 P.3d 504 (Ct. App. 2017).

State v. Lambright, 243 Ariz. 244, 404 P.3d 646 (Ct. App. 2017).
State v. Leyva, 241 Ariz. 521, 389 P.3d 1266 (Ct. App. 2017).
State v. Linares, 241 Ariz. 416, 388 P.3d 566 (Ct. App. 2017).
State v. Maestas, 242 Ariz. 194, 394 P.3d 21 (Ct. App. 2017), ***rev. granted***.
State v. Martinez, 243 Ariz. 110, 402 P.3d 995 (2017).
State v. Millis, 241 Ariz. 802, 391 P.3d 1225 (Ct. App. 2017).
State v. Nissley, 241 Ariz. 327, 387 P.3d 1256 (2017).
State v. Nixon, 242 Ariz. 242, 394 P.3d 667 (Ct. App. 2017).
State v. Pandeli, 242 Ariz. 175, 394 P.3d 2 (2017).
State v. Peltz, 241 Ariz. 792, 391 P.3d 1215 (Ct. App. 2017).
State v. Primous, 242 Ariz. 221, 394 P.3d 646 (2017).
State v. Reiher, 242 Ariz. 76, 393 P.3d 137 (Ct. App. 2017).
State v. Richter, 243 Ariz. 131, 402 P.3d 1016 (Ct. App. 2017), ***rev. granted***.
State v. Rushing, 243 Ariz. 212, 404 P.3d 240 (2017).
State v. Scott, 243 Ariz. 183, 403 P.3d 595 (Ct. App. 2017).
State v. Smith, 242 Ariz. 98, 393 P.3d 159 (Ct. App. 2017).
State v. Stutler, 243 Ariz. 128, 402 P.3d 1013 (Ct. App. 2017).
State v. Urrea, 242 Ariz. 518, 398 P.3d 584 (Ct. App. 2017), ***rev. granted***.
State v. VanDerMeulen, 243 Ariz. 233, 404 P.3d 261 (Ct. App. 2017).
State v. Weakland, 2017WL5712585 (Ct. App. 2017).
State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111 (Ct. App. 2017), ***rev. granted***.
State v. Wein (Sisco), 242 Ariz. 372, 396 P.3d 608 (Ct. App. 2017).
State v. Winegardner, 2018 WL 1462113 (2018).
Varco Inc. v. UNS Elec., 242 Ariz. 166, 393 P.3d 946 (Ct. App. 2017).
Williamson v. O'Brien, 242 Ariz. 428, 397 P.3d 361 (Ct. App. 2017).
Wright v. Gates, 243 Ariz. 118, 402 P.3d 1003 (2017).

Pending on review

Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330 (Ct. App. 2017), ***rev. granted,* 3/20/2018**.
State v. Escalante, 242 Ariz. 375, 396 P.3d 611 (Ct. App. 2017), ***rev. granted,* 3/20/2018**.
State v. Hernandez, 242 Ariz. 568, 399 P.3d 115 (Ct. App. 2017), ***rev. granted,* 11/16/2017**.
State v. Maestas, 242 Ariz. 194, 394 P.3d 21 (Ct. App. 2017), ***rev. granted,* 1/19/2018**.
State v. Richter, 243 Ariz. 131, 402 P.3d 1016 (Ct. App. 2017), ***rev. granted,* 3/20/2018**.
State v. Urrea, 242 Ariz. 518, 398 P.3d 584 (Ct. App. 2017), ***rev. granted,* 2/13/2018**.
State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111 (Ct. App. 2017), ***rev. granted,* 1/19/2018**.

CITES 2017 by Reporter

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798 (2017).

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256 (2017).
Simpson v. Miller, 241 Ariz. 341, 387 P.3d 1270 (2017).

Romero v. Hasan, 241 Ariz. 385, 388 P.3d 22 (Ct. App. 2017).
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State v. Linares, 241 Ariz. 416, 388 P.3d 566 (Ct. App. 2017).

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76 (Ct. App. 2017).
State v. Farnsworth, 241 Ariz. 486, 389 P.3d 88 (Ct. App. 2017).
State v. Havatone, 241 Ariz. 506, 389 P.3d 1251 (2017).
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State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783 (2017).

Bobrow v. Bobrow, 241 Ariz. 763, 391 P.3d 646 (Ct. App. 2017).
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State v. Fischer, 242 Ariz. 44, 392 P.3d 488 (2017).
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State v. James, 242 Ariz. 126, 393 P.3d 467 (Ct. App. 2017).
State v. Fell (Lietzau), 242 Ariz. 134, 393 P.3d 475 (Ct. App. 2017).
State v. Gulley, 242 Ariz. 149, 393 P.3d 929 (2017).
Varco Inc. v. UNS Elec., 242 Ariz. 166, 393 P.3d 946 (Ct. App. 2017).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2 (2017).
State v. Maestas, 242 Ariz. 194, 394 P.3d 21 (Ct. App. 2017), ***rev. granted***.
State v. Primous, 242 Ariz. 221, 394 P.3d 646 (2017).
State v. Nixon, 242 Ariz. 242, 394 P.3d 667 (Ct. App. 2017).

Passmore v. McCarver, 242 Ariz. 288, 395 P.3d 297 (Ct. App. 2017).
State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111 (Ct. App. 2017), ***rev. granted***.
Chantry v. Astrowsky, 242 Ariz. 355, 395 P.3d 1114 (Ct. App. 2017).

State v. Wein (Sisco), 242 Ariz. 372, 396 P.3d 608 (Ct. App. 2017).
State v. Escalante, 242 Ariz. 375, 396 P.3d 611 (Ct. App. 2017), ***rev. granted***.
State v. Hegyi (Rasmussen), 242 Ariz. 415, 396 P.3d 1095 (2017).
Nia v. Nia, 242 Ariz. 419, 396 P.3d 1099 (Ct. App. 2017).

Williamson v. O'Brien, 242 Ariz. 428, 397 P.3d 361 (Ct. App. 2017).
In re Hardt, 242 Ariz. 449, 397 P.3d 1049 (Ct. App. 2017).

State v. Urrea, 242 Ariz. 518, 398 P.3d 584 (Ct. App. 2017), ***rev. granted***.

In re Jessie T., 242 Ariz. 556, 399 P.3d 103 (Ct. App. 2017).
State v. Hernandez, 242 Ariz. 568, 399 P.3d 115 (Ct. App. 2017), ***rev. granted***.
State v. Haskie, 242 Ariz. 582, 399 P.3d 657 (2017).

State v. Johnson, 243 Ariz. 41, 401 P.3d 504 (Ct. App. 2017).
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Fitzgerald v. Myers, 243 Ariz. 84, 402 P.3d 442 (2017).
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Wright v. Gates, 243 Ariz. 118, 402 P.3d 1003 (2017).
State v. Stutler, 243 Ariz. 128, 402 P.3d 1013 (Ct. App. 2017).
State v. Richter, 243 Ariz. 131, 402 P.3d 1016 (Ct. App. 2017), ***rev. granted***.

State v. Burbey, 243 Ariz. 145, 403 P.3d 145 (2017).
Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572 (2017).
Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579 (2017).
State v. Scott, 243 Ariz. 183, 403 P.3d 595 (Ct. App. 2017).

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232 (2017).
State v. Rushing, 243 Ariz. 212, 404 P.3d 240 (2017).
Phoenix City v. Nyquist, 243 Ariz. 227, 404 P.3d 255 (Ct. App. 2017).
State v. VanDerMeulen, 243 Ariz. 233, 404 P.3d 261 (Ct. App. 2017).
State v. Lambright, 243 Ariz. 244, 404 P.3d 646 (Ct. App. 2017).

Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330 (Ct. App. 2017), ***rev. granted***.

Phillips v. O'Neil, 243 Ariz. 299, 407 P.3d 71 (2017).
State v. Chavez, 243 Ariz. 313, 407 P.3d 85 (Ct. App. 2017).

State v. Francis, 243 Ariz. 434, 410 P.3d 416 (2018).
State v. Carson, 243 Ariz. 463, 410 P.3d 1230 (2018).

State v. Godoy (Whitney), 2017WL4250136 (Ct. App. 2017).
Robert W. Baird v. Whitten, 2017WL4296583 (Ct. App. 2017).
State v. Weakland, 2017WL5712585 (Ct. App. 2017).
State v. Dodd, 2017WL6327542 (Ct. App. 2017).
State v. Chandler, 2017WL6350128 (Ct. App. 2017).
State v. Jacobson, 2017WL6523707 (Ct. App. 2017)).
Crosby-Garbotz v. Fell, 2017WL6629521 (Ct. App. 2017).
State v. Winegardner, 2018 WL 1462113 (2018).

Affirmed, Vacated, Reversed, or Overruled

Austin v. Alfred, 163 Ariz. 397, 788 P.3d 130 (Ct. App. 1990)
vac'd, State v. Hegyi (Rasmussen), 242 Ariz. 415, 396 P.3d 1095, ¶ 1 (2017).

State v. Gill, 240 Ariz. 229, 377 P.3d 1024 (Ct. App. 2016),
vac'd, 241 Ariz. 770, 391 P.3d 1193 (2017).

State v. Fischer, 238 Ariz. 309, 360 P.3d 105 (Ct. App. 2015),
vac'd, 242 Ariz. 44, 392 P.3d 488 (2017).

State v. Primous, 239 Ariz. 394, 372 P.3d 338 (Ct. App. 2016),
vac'd, 242 Ariz. 221, 394 P.3d 646 (2017).

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563 (Ct. App. 2016),
vac'd, in part, 243 Ariz. 160, 403 P.3d 572 (2017) (vacating ¶¶ 17–19, 38).

State v. Haskie, 240 Ariz. 269, 378 P.3d 446 (Ct. App. 2016),
vac'd in part, 242 Ariz. 582, 399 P.3d 657 (2017) (vacating ¶¶ 17–23).

State v. Burbey, 240 Ariz. 497, 381 P.3d 290 (Ct. App. 2016),
vac'd, 243 Ariz. 145, 403 P.3d 145 (2017).

State v. Gulley, 240 Ariz. 508, 382 P.3d 795 (Ct. App. 2016),
vac'd in part, 242 Ariz. 149, 393 P.3d 929 (2017) (vacating ¶¶ 23–29).

State v. Francis, 241 Ariz. 449, 388 P.3d 843 (Ct. App. 2017),
vac'd, 243 Ariz. 434, 410 P.3d 416 (2018).

State v. Farnsworth, 241 Ariz. 486, 389 P.3d 88 (Ct. App. 2017),
vac'd in part, 243 Ariz. 150, 403 P.3d 150 (2017) (vacating ¶¶ 13–24).

State v. Carson, 242 Ariz. 6, 391 P.3d 1198 (Ct. App. 2017),
vac'd, 243 Ariz. 463, 410 P.3d 1230 (2018).

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363 (Ct. App. 2017),
vac'd, 2018 WL 1462113 (2018).

Depublished

Williamson v. O'Brien, 242 Ariz. 428, 397 P.3d 361 (Ct. App. 2017),
depublished., 243 Ariz. 366, 407 P.3d 1219 (2017).

ARTICLE 1. GENERAL PROVISIONS.

Rule 103(a) — Preserving a Claim of Error.

103.a.160 Once the trial court has ruled against a party on an objection or offer of proof, the party may change its strategy without waiving the right to challenge the ruling on appeal.

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶ 30 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; defendant contended that, once trial court precluded her duress defense, it effectively prohibited any defense other than denial that abuse and kidnapping occurred, thus she did not waive challenge to trial court's ruling prohibiting duress defense), ***rev. granted.***

103.a.203 A party may not complain about evidence the party itself had admitted or used.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 82–83 (2017) (because defendant used evidence that he was a "flirt" to argue that his "flirtations" with victim caused victim's boyfriend to be jealous of her and kill her, defendant could not claim he was prejudiced by that evidence).

103.a.250 A party is entitled to a reversal on appeal on the basis of erroneously admitted evidence if it affected a substantial right of the party.

Varco Inc. v. UNS Electronics, Inc., 242 Ariz. 166, 393 P.3d 946, ¶¶ 2–25 (Ct. App. 2017) (in litigation over fire that destroyed plaintiff's warehouse, trial court granted plaintiff's motion to preclude evidence that cigarette butt was found near where fire originated, and evidence that plaintiff did not have property insurance; because defendant's attorney repeatedly raised these issues in front of jurors, plaintiff was prejudiced, thus trial court properly granted plaintiff's motion for new trial).

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

105.010 Evidence that is admissible for one purpose or against one party is not to be excluded merely because it is not admissible for some other purpose or against another party.

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶ 19 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea* element, it was nevertheless admissible to show she committed charged offenses under duress), ***rev. granted.***

105.055 If the trial court admits profile evidence (evidence tending to show a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity) in order to explain a victim's seemingly inconsistent behavior and aid jurors in evaluating the victim's credibility, the defendant is entitled to a limiting instruction that the jurors are not to consider the evidence as substantive proof of the defendant's guilt.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶ 26 (2017) (victim gave written statement to police stating defendant had beaten and strangled her; prior to trial, victim denied that defendant had assaulted her; state's expert witness on domestic violence testified as "cold" expert; court stated a defendant is entitled to limiting instruction, although this did not seem to be issue raised by defendant).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally (Property — Community).

380.025 There is no presumption of a gift once a petition for dissolution is filed.

Bobrow v. Bobrow, 241 Ariz. 592, 391 P.3d 646, ¶¶ 1–20 (Ct. App. 2017) (premarital agreement provided wife would not receive spousal maintenance; after wife filed petition for dissolution, husband voluntarily made monthly loan payments on wife's vehicle and marital residence where both remained living; court held trial court erred by finding husband's post-petition payment of community expenses constituted gift and remanded to allow trial court to determine offset to which husband was entitled).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

401.civ.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330, ¶¶ 27–34 (Ct. App. 2017) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court did not abuse discretion in ruling testimony about United States Supreme Court case of *Graham v. Connor,* which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim (1, severity of crime at issue; 2, whether suspect poses immediate threat to safety of officers or others; and 3, whether suspect is actively resisting arrest or attempting to evade arrest by flight, and that reasonableness of a particular use of force must be judged from perspective of reasonable officer on scene, rather than with 20/20 vision of hindsight) was relevant to extent that it helped to set expectation of what is required or not allowed in use of force, such as through K–9 officer training), ***rev. granted.***

401.civ.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Ryan v. Napier, 243 Ariz. 277, 406 P.3d 330, ¶¶ 27–34 (Ct. App. 2017) (plaintiff sued sheriff's department for injuries caused when officers used K–9 to apprehend him; trial court did not abuse discretion in ruling testimony about United States Supreme Court case of Graham v. Connor, which set forth three-part test for reasonableness in context of Fourth Amendment excessive-force claim (1, severity of crime at issue; 2, whether suspect poses immediate threat to safety of officers or others; and 3, whether suspect is actively resisting arrest or attempting to evade arrest by flight, and that reasonableness of a particular use of force must be judged from perspective of reasonable officer on scene, rather than with 20/20 vision of hindsight) was relevant to help jurors understand basis for conclusions of two experts and of officer's supervisor about reasonableness of officer's actions), ***rev. granted.***

Rule 401. Definition of "Relevant Evidence." (Criminal Cases.)

401.cr.035 Evidence that is admissible for one purpose or against one party is not to be excluded merely because it is not admissible for some other purpose or against another party.

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶ 19 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea* element, it was nevertheless admissible to show she committed charged offenses under duress), ***rev. granted.***

401.cr.120 For evidence of third-party culpability to be relevant, it must tend to create a reasonable doubt about the defendant's guilt; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 68–69 (2017) (defendant sought to introduce testimony from witness that her husband (who was also victim's boyfriend) was mean drunk, resisted efforts to get help for alcoholism, lied about attending Alcoholics Anonymous, and hit her on two occasions, and that their relationship had deteriorated because of his drinking; because this testimony had nothing to do with relationship between husband and victim, it did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 73–75 (2017) (defendant sought to introduce police report that, night before victim was murdered, Hispanic man peeked through blinds in another apartment in victim's complex and threatened to kill woman inside; because defendant's theory was that victim's boyfriend had killed her, and nothing showed that Hispanic man who peeked through blinds was victim's boyfriend, this evidence did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it).

401.cr.125 Even if evidence that another person may have committed the crime tends to create a reasonable doubt about the defendant's guilt and thus is relevant, the trial court may still exclude such evidence under Rule 403.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 68–69 (2017) (defendant sought to introduce testimony from witness that her husband (who was also victim's boyfriend) was mean drunk, resisted efforts to get help for alcoholism, lied about attending Alcoholics Anonymous, and hit her on two occasions, and that their relationship had deteriorated because of his drinking; because this testimony had nothing to do with relationship between husband and victim, it did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 73–75 (2017) (defendant sought to introduce police report that, night before victim was murdered, Hispanic man peeked through blinds in another apartment in victim's complex and threatened to kill woman inside; because defendant's theory was that victim's boyfriend had killed her, and nothing showed that Hispanic man who peeked through blinds was victim's boyfriend, this evidence did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403).

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 24–31 (2017) (in murder prosecution, medical examiner used autopsy photographs to explain victim's injuries and to testify about cause of death; court stated "[c]ause of death is always relevant" and that photographs were also relevant to show premeditation).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 83–87 (2017) (medical examiner used each of 19 autopsy photographs to explain different aspect of his testimony; detective used six crime scene photographs to show how victim was dragged into bathtub).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Civil Cases.)

403.civ.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 31–33 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended evidence that post-mortem urine sample contained cocaine metabolites was unfairly prejudicial and thus trial court erred in admitting that evidence; court held trial court properly limited admissibility of that evidence and allowed plaintiffs to recall their toxicologist to address that issue on rebuttal, thus trial court did not abuse discretion in admitting that evidence).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

403.cr.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶ 48 (2017) (merely because Y–STR profile would be found in 1 in 34 southwestern Hispanics did not have effect of causing jurors make decision based on emotion, sympathy, or horror).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 49–50 (2017) (trial court did not abuse discretion in not precluding DNA expert from using words "included," "not excluded," and "match").

State v. Scott, 243 Ariz. 183, 403 P.3d 595, ¶ 17 (Ct. App. 2017) (defendant was charged with kidnapping; because defendant claimed sex was consensual, defendant placed his intent in issue; for defendant's past conviction for sexual assault, because of identical nature of victim's relationship with defendant and similar nature of crime, evidence of defendant's past conviction was relevant and not unfairly prejudicial, thus trial court properly admitted evidence of defendant's past conviction).

403.cr.100 Once the trial court determines that a photograph has probative value, the trial court, if requested, must determine whether the photograph has any danger of unfair prejudice, and if so, whether the danger of unfair prejudice substantially outweighs the probative value.

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 30–31 (2017) (in murder prosecution, medical examiner used autopsy photographs to explain victim's injuries and to testify about cause of death; court stated "[c]ause of death is always relevant" and that photographs were also relevant to show premeditation; court stated that, although photographs were graphic, trial court acted within its discretion by finding their probative value was not outweighed by any prejudicial effect).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 83–87 (2017) (medical examiner used each of 19 autopsy photographs to explain different aspect of his testimony; detective used six crime scene photographs to show how victim was dragged into bathtub; photographs were not unduly gruesome and were not needlessly cumulative).

Rule 404(a)(1) — Character of the accused (Criminal Cases).

404.a.1.cr.040 A defendant may offer "observation evidence" about behavioral tendencies to show he or she possessed a character trait of acting reflexively in response to stress, but may not offer opinion whether defendant was or was not acting reflectively at time of killing.

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 20–21 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness testimony about PTSD could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea* element, it was nevertheless admissible as observation evidence), ***rev. granted.***

Rule 404(b) — Other crimes, wrongs, or acts (Civil Cases).

404.b.civ.240 Extrinsic evidence of another crime, wrong, or act is relevant to show **knowledge**.

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 31–33 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended defendant negligently caused death by wrongfully determining son was stable and discharging him prematurely; defendant presented evidence suggesting son ingested additional methadone after his discharge that ultimately caused his death; court held trial court did not abuse discretion in allowing evidence that postmortem urine sample contained metabolites concluding evidence was relevant to rebut testimony of plaintiffs' witnesses that son did not, or could not, or would not have sought out additional methadone after his discharge from emergency department).

Rule 404(b) — Other crimes, wrongs, or acts (Criminal Cases).

404.b.cr.225 Evidence of how drug organizations operate may be admissible to show ***modus operandi*** of such organization and thus may be relevant, typically when a defendant was found with large quantities of drugs and asserts, in defense, no knowledge of the drugs.

State v. Urrea, 242 Ariz. 518, 398 P.3d 584, ¶¶ 34–37 (Ct. App. 2017) (only issue was whether 61.8 grams of cocaine were for defendant's personal use or for sale), ***rev. granted.***

State v. Escalante, 242 Ariz. 375, 396 P.3d 611, ¶¶ 11–56 (Ct. App. 2017) (because state did not allege defendant was transporting drugs as part of drug trafficking organization, and defendant (1) was not found with drugs on his person or in his vehicle and amount of drugs found was small, (2) did not assert lack of knowledge as defense, and (3) was not charged with drug conspiracy, officer's testimony was not admissible as *modus operandi* evidence; defendant did not, however, object, and court found any error was not fundamental), ***rev. granted.***

404.b.cr.230 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **intent**, but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.

State v. Scott, 243 Ariz. 183, 403 P.3d 595, ¶¶ 13–16 (Ct. App. 2017) (because defendant claimed sex was consensual, defendant placed his intent in issue, thus trial court properly admitted evidence of defendant's past conviction for sexual assault).

404.b.cr.250 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–78 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court noted that, "where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible," and that this showed a motive for killing victim).

404.b.cr.500 Evidence of another crime, wrong, or act is admissible if it is factually or conditionally relevant, which means the proponent is able to produce sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims; proof beyond a reasonable doubt is not necessary.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–78 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in a "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court held this evidence showed by clear and convincing evidence that defendant committed these other acts).

404.b.cr.600 The trial court may exclude evidence of other crimes, wrongs, or acts under Rule 403 if the opponent objects on that basis and trial court determines that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jurors, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; because this is an extraordinary remedy, it should be used sparingly.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 76–81 (2017) (trial court admitted as other act evidence testimony from defendant's supervisor that, day before victim's murder, defendant was not speaking to victim in "normal tone," and that victim gave supervisor "funny look" that he interpreted as her requesting that he get defendant to leave, which he did, and that later that day, defendant seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment; court noted that, "where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible," and that this showed a motive for killing victim; court further held this evidence would not suggest decision based on improper basis, such as emotion, sympathy, or horror).

Rule404(c)(1)(A)—Character evidence in sexual misconduct cases—Sufficiency of evidence.

404.c.1.A.cr.015 Before admitting evidence of another act in a sexual misconduct case, the trial court must determine, by clear and convincing evidence, that the defendant committed the other act.

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 10–17 (Ct. App. 2017) (victim said defendant had molested her on other occasions, and defendant had pled guilty to committing certain other sex acts against victim's mother; court held trial court did not err in admitting other act evidence).

404.c.1.A.cr.020 If there are conflicting versions of the other act evidence, the trial court must make a credibility determination in assessing whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act.

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 18–24 (Ct. App. 2017) (victim said defendant had molested her on other occasions, and defendant had pled guilty to committing certain other sex acts against victim's mother; court held that, "given the absence of a true factual dispute regarding the other acts, the trial court did not abuse its discretion in finding the clear-and-convincing-evidence standard satisfied, even in the absence of a pretrial hearing with live witness testimony").

404.c.1.A.cr.030 In determining whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act, an evidentiary hearing is necessary only if a material factual dispute exists in the record that would necessitate the presentation of additional evidence.

State v. James, 242 Ariz. 126, 393 P.3d 467, ¶¶ 23–24 (Ct. App. 2017) (victim said defendant had molested her on other occasions, and defendant had pled guilty to committing certain other sex acts against victim's mother; because in confrontation call defendant admitted to licking and repeatedly touching victim and likewise admitted to criminal activity with victim's mother that had resulted in his conviction as sex offender, record supported both women's allegations, thus trial court did not err in not holding pre-trial hearing).

Rule 406. Habit; Routine Practice.

406.010 Habit describes a person's regular or semi-automatic response to a repeated specific situation, while character refers to a generalized description of a person's disposition.

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 29–36 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; patient records of all ICU patients who had developed pressure ulcers in 4 years preceding plaintiff's injury could be relevant for discovery purposes based on plaintiff's contention that defendant's staff had habit or routine of not following hospital's repositioning procedures), *vac'd in part,* 242 Ariz. 582, 399 P.3d 657 (2017) (vacating ¶¶ 17–23).

Rule 408. Compromise and Offers and Negotiations.

408.010 This rule precludes use of a consent judgment to prove substantive facts to establish liability for a subsequent claim, and a consent judgment likewise may not be used for impeachment purposes under Rule 613.

Phillips v. O'Neil, 243 Ariz. 299, 407 P.3d 71, ¶¶ 9–25 (2017) (Arizona Attorney General sued Phillips for violations of Arizona Consumer Fraud Act, alleging he mailed deceptive advertisements to Arizona consumers; Phillips agreed to consent judgment, in which he waived his right to a trial, admitted his actions violated the CFA and a federal regulation, and agreed to pay restitution, attorney fees, and civil penalties; court held State Bar was precluded from introducing evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct).

Rule 410. Pleas, Plea Discussions, and Related Statements.

410.070 A statement of fact form executed in order to participate in a TASC program, if not made within the context of a plea agreement discussion, is not a statement in connection with a plea agreement, and thus is not precluded by this rule.

State v. Gill, 242 Ariz. 1, 391 P.3d 1193, ¶¶ 9–14 (2017) (after state reduced possession of marijuana charges to misdemeanor and defendant rejected plea offer, parties agreed defendant would participate in TASC; when defendant failed to complete TASC program, state sought to admit statements defendant made in "statement of facts" form).

ARTICLE 5. PRIVILEGES

Rule 501. Requirements for a Privilege.

501.02.010 To be privileged, a communication must meet four criteria: (1) it originates in a confidence that the person making the communication believes will not be disclosed; (2) confidentiality is essential to the full maintenance of the relationship of the parties; (3) the relationship is one that the community believes should be fostered; and (4) the injury to the relationship that would occur from disclosure would be greater than the benefit gained by the aid given to the litigation.

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 21–27 (Ct. App. 2017) (defendant was in hospital room with door not completely closed and talking loud enough to be heard in hallway; officer was in hallway for proper purpose; court held defendant had no reasonable, objective

expectation of privacy in his statements to medical personnel, and even if he had subjective expectation of privacy, it was not one that society would recognize as reasonable; court held this was true even in context of physician-patient privilege).

Rule 501.27 Waiver by Conduct.

501.27.020 In determining whether a party through litigation has waived a privilege, Arizona has adopted an intermediate test, under which waiver exists when: (1) The assertion of the privilege was the result of some affirmative act, such as filing suit or raising an affirmative defense, by the asserting party; (2) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to that party's case; Arizona has thus rejected the most restrictive test, which requires a showing that the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation, and the least restrictive test, which requires a showing that the party has asserted a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; further, the attorney-client privilege is waived for any relevant communication if the client asserts for any material issue in the proceeding that the client acted upon the advice of a lawyer or that the legal advice was otherwise relevant to the legal significance of the client's conduct.

Robert W. Baird & Co. v. Whitten, 2017 WL 4296583, ¶¶ 9–21 (Ct. App. 2017) (plaintiff brought legal malpractice action; court held plaintiff did not waive privilege because of anything it had done, and instead issue arose because defendant relied on contributory negligence defense; court further held plaintiff's communications were not necessary to decide whether defendant committed malpractice, and preservation of privilege did not deprive defendant of information vital to its defense).

ARTICLE 6. WITNESSES

Rule 609(a). Impeachment by Evidence of a Criminal Conviction — General rule.

609.a.010 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters, thus prohibiting a defendant from introducing evidence of a witness's prior conviction may not necessarily deny the defendant the constitutional right to confront (impeach) the witness.

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363, ¶¶ 19–23 (Ct. App. 2017) (defendant sought to impeach victim-witness (who was 15 years old at time of offense in 2012) with evidence that she was convicted of shoplifting in 2015; court held evidence of conviction was not necessary to reveal any possible biases, prejudices, or ulterior motives behind victim's testimony, thus precluding defendant from impeaching victim did not violate defendant's due process and confrontation clause rights), *vac'd,* 2018 WL 1462113 (Ariz. Mar. 26, 2018).

Rule 609(a)(2) — Impeachment with a misdemeanor conviction.

609.a.2.010 The phrase "dishonest act or false statement" should be construed narrowly to include only those crimes that involve deceit, untruthfulness, or falsification, thus a misdemeanor conviction is admissible only if the elements of the crime required proving, or the witness's admitting, some element of deceit, untruthfulness, or falsification.

State v. Winegardner, 2018 WL 1462113, ¶¶ 6–17 (2018) (court held that elements of shoplifting do not necessarily involve deceit, untruthfulness, or falsification).

609.a.2.020 When the legal elements of an offense do not necessarily involve a dishonest act or false statement, the factual basis for the prior conviction may warrant admission of the conviction for impeachment purposes, in which case, the party seeking admission of the prior conviction bears the burden of establishing the factual basis for its admission, which may come from such sources as the indictment, a statement of admitted facts, or jury instructions, but this rule does not permit a "trial within a trial" delving into the factual circumstances of the conviction by scouring the record or calling witnesses.

State v. Winegardner, 2018 WL 1462113, ¶¶ 19–24 (2018) (because defendant provided trial court with no information showing shoplifting conviction involved dishonest act or false statement, trial court did not abuse its discretion in precluding evidence of shoplifting conviction).

Rule 611(b). Mode and Order of Examining Witnesses and Presenting Evidence — Scope of cross-examination.

611.b.030 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters.

State v. Winegardner, 242 Ariz. 430, 397 P.3d 363, ¶¶ 19–23 (Ct. App. 2017) (defendant sought to impeach victim-witness (who was 15 years old at time of offense in 2012) with evidence that she was convicted of shoplifting in 2015; court held evidence of conviction was not necessary to reveal any possible biases, prejudices, or ulterior motives behind victim's testimony, thus precluding defendant from impeaching victim did not violate defendant's due process and confrontation clause rights), *vac'd,* 2018 WL 1462113 (Ariz. Mar. 26, 2018)..

Rule 613. Witness's Prior Statement.

613.080 Rule 408 precludes use of a consent judgment to prove substantive facts to establish liability for a subsequent claim, and a consent judgment likewise may not be used for impeachment purposes under Rule 613.

Phillips v. O'Neil, 243 Ariz. 299, 407 P.3d 71, ¶¶ 26–28 (2017) (Arizona Attorney General sued Phillips for violations of Arizona Consumer Fraud Act, alleging he mailed deceptive advertisements to Arizona consumers; Phillips agreed to consent judgment, in which he waived his right to a trial, admitted his actions violated the CFA and a federal regulation, and agreed to pay restitution, attorney fees, and civil penalties; court held State Bar was precluded from introducing evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct).

Rule 615. Excluding Witnesses.

615.010 Exclusion of a witness is mandatory when requested in both civil and criminal cases, unless the party is able to show the witness's presence is essential to the presentation of the party's claim or defense.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶ 13 (2017) (Rule 615 requires trial court, when requested, to exclude witnesses so they cannot hear other witnesses' testimony).

Nia v. Nia, 242 Ariz. 419, 396 P.3d 1099, ¶¶ 34–36 (Ct. App. 2017) (mother contended trial court's exclusion of her expert witness during father's testimony prejudiced her ability to present her case; on appeal, mother did not argue her expert witness on finances was "essential" to the presentation of her case, but instead her expert witness's presence may have been helpful if expert had opportunity to hear father's testimony so he could provide contradictory evidence; trial court noted expert was not necessary because parties had "ample time to do discovery" and "there's [not] another expert on the other side"; court held trial court's exclusion of expert from the courtroom was not abuse of discretion).

615.060 This rule does not automatically exempt an expert witness from exclusion.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 15–16 (2017) (in medical malpractice case, at start of trial, with both parties' agreement, trial court ordered rule of exclusion of witnesses would be in effect; during trial, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court found defendant's attorney violated exclusion order; court rejected defendant's contention that expert witness is always "essential witness" and therefore not subject to exclusion, but concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

615.070 Even though the trial court has invoked the rule excluding a witness, the trial court may allow an expert witness to review transcribed testimony in order to prepare to testify.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 30–35 (2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony).

615.080 A rebuttable presumption of prejudice applies only in those limited cases in which a witness's Rule 615 violation is substantial and makes proving the existence of prejudice nearly impossible; in all other cases, the moving party at least must prove that a witness's Rule 615 violation gave rise to an objective likelihood of prejudice.

Spring v. Bradford, 243 Ariz. 167, 403 P.3d 579, ¶¶ 17–29 (2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony; court concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

701.020 A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 12–19 (Ct. App. 2017) (officer saw blood on driver's side of vehicle (inside and outside of door, on seat, floorboard, and steering wheel), and no blood on passenger's side; saw defendant had cut above left eye that was bleeding and saw blood on defendant's hands; and saw no open cuts on passenger; court held officer's opinion that defendant was driving was proper lay witness testimony and not expert testimony).

Rule 702. Testimony by Expert Witnesses.

702.008 The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.

Stafford v. Burns, 241 Ariz. 474, 389 P.3d 76, ¶¶ 28–30 (Ct. App. 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs moved to preclude any expert testimony extrapolating timing of son's last methadone injection based on son's post-mortem gastric methadone levels, claiming this was based on "junk science"; court noted both parties presented lengthy and detailed pleadings, cited supporting literature, and attached affidavits containing specific opinions of their other disclosed medical and pharmacologal experts, and concluded trial court did not abuse discretion in not holding pre-trial hearing).

Rule 702(a) — Assist trier of fact.

702.a.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 56–58 (2017) (court noted requirement that evidence be "helpful" to jurors "goes primarily to relevance," and held Y–STR results were helpful to jurors).

702.a.030 Merely because the expert is testifying as a "cold" witness does not mean that witness's testimony will not assist the jurors in determining a fact in issue.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶ 12 (2017) (*Salazar-Mercado's* rationale for cases involving child-victims applies equally to cases involving adult-victims).

702.a.035 Profile evidence tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity; while the state may not offer profile evidence as substantive proof of the defendant's guilt, the state may offer expert testimony that explains a victim's seemingly inconsistent behavior in order to aid jurors in evaluating the victim's credibility, and the more general the proffered testimony, the more likely it will be admissible, while the more the testimony is tied to the defendant's characteristics, rather than to those of the victim, the more likely the admission of such testimony will be impermissibly prejudicial.

State v. Haskie, 242 Ariz. 582, 399 P.3d 657, ¶¶ 14–22 (2017) (victim gave written statement to police stating defendant had beaten and strangled her; prior to trial, victim denied that defendant had assaulted her; state's expert witness on domestic violence testified as "cold" expert; in this case, victim's behavior and inconsistent statements were squarely at issue, and testimony was limited to questions designed to help jurors understand sometimes counter-intuitive behaviors of domestic violence victims; court concluded witness did not engage in offender profiling, but said trial courts should exercise great caution in admitting this type of evidence).

702.a.070 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* expert may testify about the defendant's behavior that expert observed ("observation evidence").

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 20–21 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea* element, it was nevertheless admissible as observation evidence), ***rev. granted.***

Rule 702(b) — Testimony based on sufficient facts or data.

702.b.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is based on sufficient facts or data.

State v. Jacobson, 2017 WL 6523707, ¶¶ 16–17 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court noted diagnosis was based solely on defendant's statements to doctors that boyfriend had abused her and not on any outside observations, and that defendant had omitted key information, thus testimony was based on insufficient facts or data and therefore was not admissible).

Rule 702(c) — Reliable principles and methods.

702.c.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is the product of reliable principles and methods.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 45–47 (2017) (because police department's protocol guidelines permitted witness to use below-threshold allele for statistical purposes, witness's opinion was reliable).

Rule 702(d) — Reliably applied principles and methods.

702.d.010 A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 52–53 (2017) (because witness properly applied guidelines from Scientific Working Group on DNA Analysis Methods, trial court did not abuse discretion in admitting witness's testimony).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 60–61 (2017) (although defense expert criticized identifying major contributor based on information at only one locus, jurors could decide whose opinion to credit).

Rule 702(f) Statutes and Rules.

702.f.021 A defendant may move for summary judgment based on a proposed expert's lack of requisite qualifications under A.R.S. § 12–2604 without first challenging the sufficiency of the expert affidavit under A.R.S. § 12–2603.

Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572, ¶¶ 3–26 (2017) (plaintiff filed medical malpractice action and filed certification verifying need for expert testimony to prove claims pursuant to § 12–2603(A), and subsequently filed preliminary expert affidavit pursuant to § 12–2603(B) identifying RN Ho as her expert on standard of care and causation; after expert disclosure deadline, defendant deposed Ho; plaintiff filed preemptive motion to qualify Ho as expert on standard of care, causation, and prognosis, and alternately asked to identify another expert if trial court precluded any of Ho's opinion evidence; defendant then moved for summary judgment, arguing Ho did not qualify as expert on standard of care or causation under § 12–2604, and therefore plaintiff could not satisfy her burden on those elements of her claim and case should be dismissed; at oral argument on plaintiff's motion, trial court found Ho was qualified to testify about standard of care for wounds, but expressed was concerned whether she could testify about causation; trial court subsequently ruled plaintiff could introduce Ho's expert opinion about wound care, and reserved the remaining issues for summary judgment hearing; at oral argument on motion for summary judgment, plaintiff again requested permission to find another expert if Ho's qualifications were found wanting; trial court denied that request and granted summary judgment motion without explanation; court held challenging expert's affidavit under § 12–2603 is not prerequisite for filing summary judgment motion for lack of requisite expert qualifications under § 12–2604, and instead proper recourse for plaintiff whose expert's qualifications are challenged for first time in summary judgment motion is to seek relief under Rule 56(d)).

702.f.022 If a claimant is required to serve a preliminary expert opinion affidavit and fails to do so, the case is subject to dismissal, but the dismissal is not for failure to prosecute, so dismissal must be without prejudice.

Williamson v. O'Brien, 242 Ariz. 428, 397 P.3d 361, ¶¶ 9–12 (Ct. App. 2017) ((trial court ordered plaintiff to file preliminary expert opinion affidavit by certain date, which plaintiff failed to do; trial court dismissed case with prejudice; court noted *Passmore v. McCarver* held dismissal was for lack of prosecution, but disagrees with that conclusion, and ordered dismissal to be without prejudice); ***depublished,*** 243 Ariz. 366, 407 P.3d 1219 (2018).

Boswell v. Fintelmann, 242 Ariz. 52, 392 P.3d 496, ¶¶ 2–8 (Ct. App. 2017) (trial court ordered plaintiff to file preliminary expert opinion affidavit by certain date, which plaintiff failed to do; court stated: "Dismissal for failure to serve the expert affidavit is not tantamount to dismissal for failure to prosecute, which operates as an adjudication on the merits"; court held trial court appropriately dismissed plaintiff's claim, but erred in dismissing it with prejudice).

702.f.023 If a claimant is required to serve a preliminary expert opinion affidavit and fails to do so, the cases is subject to dismissal, and because the dismissal is for lack of prosecution, the dismissal must be with prejudice.

Passmore v. McCarver, 242 Ariz. 288, 395 P.3d 297, ¶¶ 2–13 (Ct. App. 2017) (in March 2013, plaintiff filed medical malpractice action, but did not file preliminary expert opinion affidavit and received an extension; when plaintiff again did not file affidavit, defendants moved for dismissal; by September 2014, plaintiff still had not filed affidavit, so trial court entered order dismissing case without prejudice; 2 weeks later, plaintiff refiled claim under § 12–504; trial court stated prior dismissal was without prejudice, but in its discretion dismissed the refiled case with prejudice; court held original dismissal was for lack of prosecu-

tion: "We hold that when a case is dismissed for failure to serve a preliminary expert affidavit under § 12–2603, the dismissal is for lack of prosecution"; because original dismissal was for lack of prosecution, plaintiff was not entitled to automatic relief under § 12–504; further, trial court did not abuse discretion in denying relief under that section).

702.f.025 A.R.S. § 12–2603 requires the filing of a preliminary expert opinion affidavit, and does not allow for the testimony at a hearing in lieu of an affidavit.

Romero v. Hasan, 241 Ariz. 385, 388 P.3d 22, ¶¶ 3–9 (Ct. App. 2017) (trial court ordered plaintiff to file preliminary expert opinion affidavit; plaintiff requested that his treating physician testify at hearing in lieu of affidavit; trial court did not err in dismissing plaintiff's claim without prejudice).

702.f.065 If the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist and must have devoted a majority of time in the year immediately preceding to occurrence to the active clinical practice in the same health profession as defendant.

Rasor v. Northwest Hospital LLC, 243 Ariz. 160, 403 P.3d 572, ¶¶ 27–33 (2017) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and to timely discover pressure ulcer; plaintiff retained as expert board-certified wound-care nurse to testify both on standard of care and causation; court stated it did not have to resolve question whether ICU nurses are considered specialists because plaintiff's expert was not practicing as ICU nurse for year prior to plaintiff's injury; court remanded for court of appeals to determine whether expert testimony on causation was required and possibly remand to trial court to allow plaintiff to seek relief under Rule 56(d)).

702.f.140 Rule 26(b)(4)(D) provides that, unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue; that rule, however, contemplates liberal expansion of its presumptive limitation when an issue cuts across several professional disciplines.

In re Hardt, 242 Ariz. 449, 397 P.3d 1049, ¶¶ 6–17 (Ct. App. May 30, 2017) (plaintiff contended defendant was negligent in causing Stage IV ulcers; in its case-in-chief, plaintiff presented Dr. S., board certified in internal medicine and infectious disease, who testified ulcers were preventable through repositioning, wound care, and adequate nutrition, but did not testify about vascular issues; defendant's expert, Dr. G., board certified general and vascular surgeon, testified that plaintiff's ulcers were caused by lack of blood flow that pre-dated plaintiff's admission to defendant's hospital; in rebuttal, plaintiff sought to call Dr. C., vascular surgeon; trial court precluded Dr. C., concluding he was "a duplicative expert"; court held Dr. C. would have testified about matters different than those about which Dr. S. testified, thus trial court erred in precluding Dr. C., and ordered new trial).

Rule 703. Bases of an Expert's Opinion Testimony.

703.110 Although an expert witness is allowed to disclose facts or data not admissible in evidence if they are of the type upon which experts reasonably rely, the expert should not be allowed to act merely as a conduit for the other expert's opinion and thus circumvent the requirements excluding certain types of hearsay statements.

State v. Smith, 242 Ariz. 98, 393 P.3d 159, ¶¶ 6–13 (Ct. App. 2017) (technician K.L. conducted saliva tests on victim's underwear and submitted test results to analyst B.S., who testified at trial basing testimony in part on K.L.'s test results; because B.S. testified at trial, but had not done any independent analysis of test results, her testimony was hearsay and violated defendant's right of confrontation).

Rule 704. Opinion on an Ultimate Issue.

704.030 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Jacobson, 2017 WL 6523707, ¶ 12 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court noted diagnosis was based solely on defendant's statements to doctors that boyfriend had abused her and not on any outside observations, and that defendant had omitted key information; court held PTSD diagnosis only served to vouch for defendant's credibility and therefore was not admissible).

704.045 Although an expert may not give an opinion about the defendant's state of mind on the issue of *mens rea,* an expert may testify about the defendant's behavior that the expert observed ("observation evidence").

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 20–21 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; even assuming testimony by defendant and expert witness could have been construed as diminished-capacity evidence, which would be inadmissible to negate *mens rea,* it was nevertheless admissible as observation evidence), ***rev. granted.***

ARTICLE 8. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

Rule 801(c) — Hearsay.

801.c.035 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 46–51 (2017) (Dr. B. performed autopsy, and Dr. K. testified he formed his own opinion of cause of death based on autopsy report and photographic exhibits; autopsy report not admitted in evidence; court noted it "has held that an autopsy report is nontestimonial when created to determine the manner and cause of death to aid in apprehending a suspect at large, rather than gathering evidence for prosecution of a known suspect").

State v. Smith, 242 Ariz. 98, 393 P.3d 159, ¶¶ 6–13 (Ct. App. 2017) (technician K.L. conducted saliva tests on victim's underwear and submitted test results to analyst B.S., who testified at trial basing testimony in part on K.L.'s test results; because B.S. testified at trial, but had not done any independent analysis of test results, her testimony was hearsay and violated defendant's right of confrontation).

Rule 801(d)(2)(A) —Statements that are not hearsay: Party-opponent's own admission.

801.d.2.A.005 A party's statement is admissible.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 70–71 (2017) (victim's boyfriend was not available at time of trial; defendant sought to admit testimony from detective that boyfriend had said he and victim had fought several days before victim was killed and that boyfriend had said he had been "bad" to his wife; court held statements were not admissible under this rule because boyfriend was not a party).

Rule 802. The Rule Against Hearsay.

802.010 Evidence that is hearsay is inadmissible.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 62–67 (2017) (trial court properly excluded as hearsay witness's statement that victim (now deceased) told her that victim's boyfriend had bruised her arm and that he was violent with his wife).

Rule 804(b)(3). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Statements against interest.

804.b.3.030 A statement is admissible if, at the time that the declarant made it, it was so contrary to the declarant's pecuniary or proprietary interest, or subjected the declarant to civil or criminal liability, that the declarant would not have made it if it were not true.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 70–72 (2017) (victim's boyfriend was not available at time of trial; defendant sought to admit testimony from detective that boyfriend had said he and victim had fought several days before victim was killed and that boyfriend had said he had been "bad" to his wife; court held these statements were vague and thus did not implicate criminal behavior, thus they were not admissible under this rule).

Rule 807. Residual Exception.

807.010 To be admissible, the statement must have equivalent circumstantial guarantees of trustworthiness that make it at least as reliable as evidence admitted under a firmly rooted hearsay exception.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 64–65 (2017) (witness made statements that victim (now deceased) told her that victim's boyfriend had bruised her arm and that he was violent with his wife; court held this was hearsay, and concluded these statements were not as reliable as statement against interest, statement of opposing party, statement of then-existing mental emotional or physical condition, or statement for medical diagnosis or treatment).

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901(a) — General provision.

901.a.010 For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

State v. Fell (Lietzau), 242 Ariz. 134, 393 P.3d 475, ¶¶ 4–15 (Ct. App. 2017) (for charge of sexual conduct with minor, state sought to introduce recordings purportedly between defendant and victim; court noted (1) probation officer had claimed defendant told him messages were from victim; (2) messages were consistent with other evidence; (3) victim had admitted having a sexual relationship with defendant; (4) victim would testify about exchanged text messages between defendant and her; (5) recordings of jail calls showed defendant had asked family members to contact victim; (6) defendant had given phone to victim; (7) defendant referred to fact he had carved "[victim] is mine" on his arm; and (8) defendant had identified himself in one message; court held this was sufficient evidence for jurors to conclude recordings were between defendant and victim; fact that phone was not in defendant's name and other people had access to it went to weight and not admissibility).

13–105(39) Definitions. (Serious physical injury.)

.010 "Serious physical injury" includes a physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health, or loss or protracted impairment of the function of any bodily organ or limb; a "serious impairment of health" must be more than a temporary but substantial impairment of health and more than the usual temporary impairment caused by the fracture of a body part, and must be comparable in terms of its gravity to an injury that creates a reasonable risk of death or substantial and permanent disfigurement; "protracted impairment" must be longer than either the temporary but substantial impairment of the use of a limb or the healing time of a normal fracture.

State v. Dodd, 2017 WL 6327542, ¶¶ 13–17 (Ct. App. 2017) (defendant engaged officers in high-speed pursuit ending in collision, which broke victim's ribs and bruised her lung, broke her femur (largest bone in human body) and hip socket, dislocating femur from pelvis; fractures were so severe that victim could not be treated at regional medical center, but had to be transported to hospital with higher level of trauma care; court held this evidence showed at very least that victim's injuries caused "serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb," as statute requires).

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 10–11 (Ct. App. 2017) (83-year-old victim suffered laceration of spleen, which carried risk of internal bleeding, burst fracture to spine, and orbital fracture with bruising; court held reasonable juror could have concluded victim's injuries were "serious physical injuries" as defined by this statute).

13–201 Requirements for criminal liability.

.070 The Arizona legislature has declined to adopt a defense of diminished capacity, thus a defendant is not permitted to introduce evidence that his or her mental state was such that he or she could not act intentionally or knowingly.

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 6–32 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense), ***rev. granted.***

13–203(A) Causal relationship between conduct and result; relationship to mental culpability—Causal relationship.

.010 In order for a subsequent act to be a superseding cause, it does not matter whether the subsequent act is in response to something the defendant did or was entirely coincidental to what the defendant did; in order for such an act to be a superseding cause and thus excuse criminal liability, the subsequent act must be both unforeseeable and either abnormal or extraordinary.

State v. Dodd, 2017 WL 6327542, ¶¶ 8–12 (Ct. App. 2017) (defendant engaged officers in high-speed pursuit; after defendant's car stopped, defendant got out; believing defendant might attempt to flee, officer deliberately hit back of defendant's car with his police cruiser, pushing car into defendant and causing him to fall to ground; officers discovered passenger in defendant's car who had been injured; defendant claimed insufficient evidence showed his actions, rather than those of officer in hitting his car, caused passenger's injuries; court held evidence showed that, but for defendant's conduct in fleeing from officers, victim would not have been injured, and to extent officer's conduct in hitting defendant's car may have been cause of injuries to passenger, officer's conduct was not unforeseeable).

13–401 Unavailability of justification defense; justification as defense.

.040 Although a mistaken identity defense and a justification defense are inconsistent, a defendant may assert both defenses if the facts support justification.

State v. Carson, 243 Ariz. 463, 410 P.3d 1230, ¶¶ 8–16 (2018) (after confrontation, witness saw defendant on ground and four men (including J.M. and S.B.) hitting and kicking him; witness pulled S.B. from fight and walked him across street; another witness saw man stand up, pull out gun, and start shooting at J.M., and then at S.B.; police found bodies of J.M. and S.B. 1½ to 2 blocks apart; J.M. was shot twice in back and S.B. was shot in side of chest and foot; defendant claimed mistaken identity; so trial court denied defendant's request for self-defense instruction; court held there was slightest evidence of self-defense, thus trial court erred in refusing self-defense instruction, even though those defenses were inconsistent).

13–403 Justification; use of physical force.

.010 Generally, an objective standard is used in determining whether a defendant's use of force was reasonable, thus using force in self-defense is based on a reasonable person's belief, not the unreasonable, even if honest, belief of the accused.

Cespedes v. Lee, 243 Ariz. 46, 401 P.3d 995, ¶¶ 14–16 (2017) (court rejected defendant's contention prosecutor should have instructed on subjective component of justification (whether defendant believed he was acting reasonably)).

13–412 Duress.

.010 A defendant is entitled to claim duress only upon presenting evidence that the defendant was compelled to engage in the proscribed conduct because of the threat or use of immediate physical force against the defendant or another.

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 6–32 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense), ***rev. granted.***

.030 Even if the threat or use of physical force is ongoing, that can establish a "threat or use of immediate physical force," and it becomes a jury question whether the threat or use is immediate.

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 22–29 (Ct. App. 2017) (evidence showed husband's abusive behavior occurred over several months), ***rev. granted.***

13–415 Justification; domestic violence.

.010 Typically, jurors consider a self-defense claim from the perspective of a reasonable person, but by statute, a self-defense claim by a victim of domestic violence is considered from the modified perspective of a reasonable person who has been a victim of those past acts of domestic violence, and to apply this modified reasonable person standard, the jurors must first determine whether the victim perpetrated past acts of domestic violence against the defendant, and, if so, then determine whether a reasonable person who had been subjected to those past acts of domestic violence would have used physical force in self-defense.

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court noted diagnosis was based solely on defendant's statements to doctors that boyfriend had abused her and not on any outside observations, and that defendant had omitted key information; court held PTSD diagnosis only served to vouch for defendant's credibility and therefore was not admissible).

13–502(A) Insanity test; burden of proof; guilty except insane verdict—Standard.

.030 The Arizona legislature has declined to adopt a defense of diminished capacity, thus a defendant is not permitted to introduce evidence that his or her mental state was such that he or she could not act intentionally or knowingly.

State v. Jacobson, 2017 WL 6523707, ¶¶ 6–20 (Ct. App. 2017) (defendant fatally shot her live-in boyfriend in head while he was lying in bed; in severance proceedings, doctors diagnosed defendant with PTSD; for criminal proceedings, court held PTSD diagnosis was opinion testimony going to mental defect and its effect on cognitive or moral capacities on which sanity depends, and thus was not admissible, and disagreed with *Richter* court that such testimony was admissible as observation evidence).

State v. Richter, 243 Ariz. 131, 402 P.3d 1016, ¶¶ 6–32 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; because defendant did not claim her husband's behavior caused her some mental incapacity that negated her specific intent, but instead contended she acted out of fear as result of husband's abusive behavior, trial court erred in precluding her from presenting evidence and claiming duress defense), ***rev. granted.***

State v. Millis, 242 Ariz. 33, 391 P.3d 1225, ¶¶ 12–17 (Ct. App. 2017) (defendant convicted of child abuse and first-degree murder as result of causing injuries to roommate's 8-month-old son; court held trial court properly precluded evidence that defendant suffered from autism spectrum disorder, rejecting defendant's claim that such evidence would have shown he had "difficulty in understanding how to interact appropriately with others," which could have made it "more or less likely that he formed the intent required in this particular case").

13–603(C) Authorized disposition of offenders—Restitution.

.010 The trial court should order restitution for losses if the following requirements are satisfied: (1) The loss must be economic; (2) the loss must be one that the victim would not have incurred but for the defendant's criminal offense; and (3) the criminal conduct must directly cause the loss.

State v. Stutler, 243 Ariz. 128, 402 P.3d 1013, ¶¶ 3–7 (Ct. App. 2017) (trial court did not err in awarding victim $900 in lost earnings for week she was away from her bakery because she did not feel safe from defendant).

.020 The trial court should not order restitution for losses if the following requirements are not satisfied: (1) The loss must be economic; (2) the loss must be one that the victim would not have incurred but for the defendant's criminal offense; and (3) the criminal conduct must directly cause the loss.

State v. Linares, 241 Ariz. 416, 388 P.3d 566, ¶¶ 7–13 (Ct. App. 2017) (because purpose of forensic medical examination was to see if there was evidence of child abuse and thus to investigate whether there had been a crime, as opposed to medical treatment, trial court erred in ordering defendant to pay cost of examination as restitution).

.230 Although the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court, restitution is not part of the sentence, thus the trial court may retain jurisdiction to enter an order of restitution at a later date.

State v. Grijalva, 242 Ariz. 72, 392 P.3d 516, ¶¶ 2–14 (Ct. App. 2017) (trial court imposed sentence in October 2012 and stated it retained jurisdiction over restitution; in March 2014; trial court entered order of restitution; court held trial court properly retained jurisdiction to do so).

13–705(O) Dangerous crimes against children—Preparatory, attempted, and completed offenses.

.010 Solicitation of an enumerated DCAC offense is a second-degree dangerous crime against children.

Wright v. Gates, 243 Ariz. 118, 402 P.3d 1003, ¶¶ 9–12 (2017) (in 1992, defendant was charged with solicitation to commit molestation of child pursuant to A.R.S. § 13–604.01 (renumbered as A.R.S. § 13–705, effective Jan. 1, 2009); court rejected defendant's argument that, because legislature had not specifically listed solicitation as DCAC, he was not guilty of DCAC offense).

13–705(P) Dangerous crimes against children—Victim under 15 years of age.

.040 This section does not apply to offenses when the victim is a fictitious child, and instead requires an actual child victim for DCAC enhanced sentences to apply to the enumerated offenses.

Wright v. Gates, 243 Ariz. 118, 402 P.3d 1003, ¶¶ 13–18 (2017) (spoke to woman about allowing him to engage in sexual acts with her two young children; woman was actually postal inspector and children were fictitious; defendant pled guilty to two counts of solicitation to commit molestation of child; court held DCAC sentencing statute did not apply).

13–707(B) Misdemeanor sentencing—Nature of the offense.

.010 This section provides that a person convicted of a new misdemeanor with a prior conviction for the same misdemeanor shall be sentenced for the next higher class, but that new misdemeanor conviction remains the same class.

State v. Gulley, 242 Ariz. 149, 393 P.3d 929, ¶ 4 (2017) (defendant was convicted of disorderly conduct with a prior conviction for disorderly conduct; court accepted defendant's contention that, although he was required to be sentenced for a class 6 felony, his disorderly conduct conviction remained a class 1 misdemeanor).

13–711 Consecutive terms of imprisonment.

.010 The criminal code presumes that multiple sentences, and a sentence when the defendant is serving another sentence, will be served consecutively, and the trial court may not impose a concurrent sentence unless it states reasons for doing so.

State v. Lambright, 243 Ariz. 244, 404 P.3d 646, ¶¶ 18–19 (Ct. App. 2017) (defendant had been sentenced to death and for terms of 21 years on two other counts; after various remands, defendant was ultimately sentenced to life for murder conviction; court held trial court was within discretion in making life sentence consecutive to other sentences).

13–904(A) Suspension of civil rights and occupational disabilities—Rights suspended.

.010 In 1994, the legislature amended this section to provide that the rights suspended included the right to possess a gun or firearm; for a person convicted before 1994, this statute did not change the consequences of the person's past acts; instead, it related to conditions that existed in 1994, thus if a person was a convicted felon in 1994 whose civil rights had not yet been restored, then the right to possess a gun or firearm also would be suspended.

State v. Nixon, 242 Ariz. 242, 394 P.3d 667, ¶¶ 2–7 (Ct. App. 2017) (defendant was convicted in 1987 and placed on 15 years' probation, which he completed in 2002; in 2007, defendant filed motion to have his civil rights (including his gun rights) restored, which trial court denied; in 2016, defendant renewed request; trial court granted request, except it denied request to have gun rights restored; court rejected defendant's argument that "completed event" was his 1987 conviction and that A.R.S. § 13–904(A)(5) added legal consequence to that completed event).

13–1304(A) Kidnapping—Elements.

.080 A defendant may be convicted of two counts of kidnapping only if, after the original kidnapping concluded with the victim's release from restraint, the victim was restrained anew, with the requisite intent.

State v. Scott, 243 Ariz. 183, 403 P.3d 595, ¶¶ 9–12 (Ct. App. 2017) (defendant forced victim into bedroom and said he wanted sex; victim was able to break free and run into living room, where she intended to gather her children and leave; before she could do so, defendant knocked her down, grabbed her by the legs, and dragged her back into bedroom; court held victim was momentarily free while in living room, thus defendant committed second act of kidnapping when he dragged her back into bedroom).

13–1405 Sexual conduct with a minor.

.020 This section prohibits sexual intercourse and oral sexual contact, but it does not prohibit sexual contact.

State v. Gulli, 242 Ariz. 18, 391 P.3d 1210, ¶¶ 1–10 (Ct. App. 2017) (defendant was charged with sexual conduct with a minor; trial court properly instructed jurors on "sexual conduct with a minor" and definition of "sexual intercourse," but also included language for sexual contact; court held trial court's instruction effectively created non-existent way of committing sexual conduct with minor, which court held was fundamental error).

.070 The provisions of A.R.S. § 13–705 apply to attempted sexual conduct with a minor when the victim is 15 years of age or older, and the defendant believes victim is 12, 13, or 14 years of age.

State v. Farnsworth, 241 Ariz. 486, 389 P.3d 88, ¶¶ 13–24 (Ct. App. 2017) (defendant was convicted of attempted sexual conduct with minor based on communications between defendant and detective posing as 13-year-old, together with further acts in attempting to meet person defendant thought was 13-year-old girl).

13–2501(1) Escape and related offenses; Definitions—Contraband.

.010 Contraband means any article whose use or possession would endanger the safety, security, or preservation of order in a correctional facility, including but not limited to the articles that are listed by name.

State v. Francis, 243 Ariz. 434, 410 P.3d 416, ¶ 7 (2018) (statute lists "wireless communication device," thus cell phone is contraband; defendant knew he possessed cell phone, issue was whether he knew cell phone was contraband).

13–2505 Promoting prison contraband; definitions.

.020 A person promotes prison contraband if the person knowingly makes, obtains, or possesses contraband while incarcerated; the person must knowingly make, obtain, or possess the item, but does not need to know that it is contraband.

State v. Francis, 243 Ariz. 434, 410 P.3d 416, ¶¶ 8–14 (2018) (when arrested, officers took defendant's possessions, including his cell phone; when defendant asked to call his attorney, officer gave him back his cell phone; once defendant was transported to jail, another officer noticed defendant had his cell phone; court held trial court properly instructed jurors that state was not required to prove defendant knew cell phone was contraband).

§ 13–2910 Cruelty to animals; interference with working or service animal.

.010 A person commits cruelty to animals under subsection (A)(3) if the person intentionally, knowingly, or recklessly inflicts unnecessary physical injury to any animal.

In re Jessie T., 242 Ariz. 556, 399 P.3d 103, ¶¶ 21–25 (Ct. App. 2017) (juvenile admitted he shot cat with pellet gun and admitted friend later disemboweled cat; court held evidence was not sufficient to support conviction under (A)(9), but was sufficient to support conviction under (A)(3), which it held was lesser-included offense of (A)(9)).

.020 A person commits cruelty to animals under subsection (A)(9) if the person intentionally or knowingly subjects any animal to cruel mistreatment.

In re Jessie T., 242 Ariz. 556, 399 P.3d 103, ¶¶ 10–20 (Ct. App. 2017) (juvenile admitted he shot cat with pellet gun and admitted friend later disemboweled cat; court held evidence was not sufficient to support conviction under (A)(9), but was sufficient to support conviction under (A)(3)).

13–3102 Misconduct involving weapons, defenses.

.020 Section (A)(12) provides that misconduct involving weapons occurs when a person knowingly possesses a deadly weapon on school grounds, and section (I)(1) provides an exception when the weapon is a firearm that is not loaded and that is carried within a means of transportation under the control of an adult; court construed "loaded" to mean containing ammunition in a cylinder,

magazine, or clip, and the fact that some states define "loaded" not to include a weapon with ammunition in a cylinder or clip, but not in the firing chamber, does not make Arizona's statute unconstitutionally vague.

State v. Johnson, 243 Ariz. 41, 401 P.3d 504, ¶¶ 2–12 (Ct. App. 2017) (defendant was on school property and possessed gun with bullets in magazine, but none in firing chamber).

13–3551(5) Sexual Exploitation of Children—Definitions. (Exploitive exhibition.)

.010 "Exploitive exhibition" means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer, which means the viewer intends the photograph be used for sexual stimulation, rather than that the minor intends to sexually stimulate the viewer.

State v. Chandler, 2017 WL 6350128, ¶¶ 3–8 (Ct. App. 2017) (defendant used hidden camera to record teenage daughters while they were in bathroom, and obtained videos of them using toilet, bathing, and shaving their genitals; court rejected defendant's contention that statute requires minor to engage in sexual conduct and to intend to stimulate viewer sexually, and instead held statute requires only that viewer intends photograph be used for viewer's sexual stimulation).

13–3822 Notice of moving from place of residence or change of name or electronic information; forwarding of information; definitions.

.010 This statute requiring a person to notify the sheriff within 72 hours of moving from the person's residence does not apply to a person who becomes homeless, thus only the requirement to register not less than every 90 days applies.

State v. Burbey, 243 Ariz. 145, 403 P.3d 145, ¶¶ 5–17 (2017) (defendant resided in halfway house, but then moved out and became homeless; court held defendant only had to register every 90 days).

13–3961 Offenses not bailable; pre-conviction; exceptions.

.020 To the extent § 13–3961(A) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only for an offense that inherently demonstrates future dangerousness, and for an offense that does not inherently demonstrate future dangerousness, only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.

Simpson v. Miller, 241 Ariz. 341, 387 P.3d 1270, ¶¶ 14, 24–31 (2017) (defendants were charged with sexual conduct with minor under age of 15, which is an offense that does not inherently demonstrate future dangerousness).

Chantry v. Astrowsky, 242 Ariz. 355, 395 P.3d 1114, ¶¶ 1–5 (Ct. App. 2017) (defendant was charged with child molestation).

.030 A defendant may be denied release for an offense that inherently demonstrates future dangerousness, and sexual assault is an offense that inherently demonstrates future dangerousness.

State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111, ¶¶ 1–9 (Ct. App. 2017) (defendants were each charged with sexual assault; trial courts held state failed to prove defendants were ongoing dangers to community and set bail; court held "[s]exual assault remains a non-bailable offense" and therefore granted relief to state), ***rev. granted.***

13–3967. Release on bailable offense before trial.

040 This section authorizes the trial court to impose pretrial release conditions, but these conditions must comply with Arizona Rules of Criminal Procedure 7.2(a) and 7.3(b), which require release conditions to be the least onerous that are reasonable and necessary to protect other persons or the community.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 2, 8–18 (2017) (defendant was charged with five counts of public sexual indecency to minor and two counts of public sexual indecency after he allegedly stood nude at his apartment window and masturbated in view of victims (two women and five children) who were walking on sidewalk; court held trial court had authority to impose as release condition that he reside apart from his family and that he have no unsupervised contact with his minor non-victim children).

050 Arizona rules and statutes do not require an evidentiary hearing to impose initial pretrial release conditions or to reconsider the conditions; rather, what is required is an opportunity to be heard on release conditions.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 19–23 (2017) (defendant was timely heard before neutral judge, was assisted by attorney and translator, and was permitted to argue and offer information otherwise inadmissible under evidentiary rules).

060 In order to impose the least onerous release conditions reasonable and necessary to protect the public, the trial court must make an individualized determination, and must make findings and articulate its reasoning for determining that the conditions are the least onerous measures reasonable and necessary to mitigate an identifiable risk of harm.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 24–27 (2017) (because record was inadequate to determine whether trial court's pretrial release conditions complied with newly promulgated rules and were based on individualized determination, court vacated those conditions and directed trial court to consider anew any appropriate pretrial release conditions).

13–4041(B) Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in post-conviction relief proceedings; reimbursement—appointment of counsel.

.010 This section, which requires the appointment of counsel for post-conviction relief proceedings, does not mention, let alone require, competence, nor does it provide any right to effective communication between Rule 32 counsel and the client, thus this section does not require a trial court to determine whether the defendant is competent before proceeding with and ruling on the post-conviction relief petition, but the trial court, in its discretion, may order a competency evaluation if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain claims.

Fitzgerald v. Myers, 243 Ariz. 84, 402 P.3d 442, ¶¶ 3–15 (2017) (prior to trial, defendant was found incompetent and then restored to competency; during penalty phase, defendant was again found incompetent and again restored to competency; during post-conviction relief proceedings, defendant's expert opined defendant was not competent; court held trial court correctly denied defendant's request for competency hearing).

13–4422 Post-arrest custody decisions.

.010 The victim has the right to be heard at any proceeding in which the court considers the post-arrest release of the person accused of committing a criminal offense against the victim or the conditions of that release.

State v. Wein (Sisco), 242 Ariz. 372, 396 P.3d 608, ¶¶ 1–11 (Ct. App. 2017) (defendant charged with sexual assault, child molestation, and sexual conduct with minor; state wanted to present victim's statement through representative; trial court held it would not consider victim's statement unless defendant had opportunity to cross-examine victim; court held that "victim's statements, despite being hearsay, are permitted and must be considered in a *Simpson II* hearing").

13–4442 Use of a facility dog in court proceedings.

.010 This section permits a trial court (1) to allow a victim who is under 18 years of age to have a facility dog and accompany the victim while testifying in court, and (2) to allow a witness to use a facility dog.

State v. Millis, 242 Ariz. 33, 391 P.3d 1225, ¶¶ 27–33 (Ct. App. 2017) (trial court allowed facility dog to accompany victim's mother while she sat in gallery, but not while she testified; court noted § 13–4442 was not in effect at time of defendant's trial, but that it showed policy in Arizona to accommodate crime victims' use of dog; court further noted trial court conducted proper inquiry to determine whether to allow facility dog).

15–108 Medical marijuana; school campuses.

.010 Although the AMMA does not prevent a property owner (including the state) from prohibiting medical marijuana use on the owner's property, it does prohibit the criminalization of marijuana use; because A.R.S. § 15–108(A) criminalizes medical marijuana use, it does not further the purpose of the AMMA, thus it violates the Voter Protection Act and is therefore unconstitutional.

State v. Maestas, 242 Ariz. 194, 394 P.3d 21, ¶¶ 1–15 (Ct. App. 2017) (court did hold, however, that public colleges and universities are not required to allow marijuana use, even by cardholders, on campus), ***rev. granted.***

22–375(A) Jurisdiction of Court of Appeals.

.010 When a person is convicted in a court of limited jurisdiction and the superior court affirms the conviction, if the person appeals to the court of appeals, jurisdiction is limited to a review of the facial validity of the statute in question.

State v. Reiher, 242 Ariz. 76, 393 P.3d 137, ¶¶ 2–6 (Ct. App. 2017) (defendant was convicted of DUI in municipal court and appealed his conviction to superior court, which affirmed judgment and sentence; on appeal to court of appeals, defendant asked court to apply *State v. Valenzuela* and *Brown v. McClennen* retroactively; court held that, because defendant was not challenging validity of statute, court did not have jurisdiction to grant relief requested).

28–622.01 Unlawful flight from pursuing law enforcement vehicle.

.060 In order to violate this section, all a person has to do is refuse to stop on the command of an officer who is in a police car, thus there is no requirement that the person take evasive action or lead the police car on a high-speed chase.

State v. Hernandez, 242 Ariz. 568, 399 P.3d 115, ¶¶ 9–27 (Ct. App. 2017) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly after that, driver turned into private driveway and proceeded into backyard area of residence; when vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, when defendant did not stop in response to emergency lights, defendant violated either A.R.S. § 28–622.01 or § 28–1595(A), so officers properly pursued defendant onto property), ***rev. granted.***

28–672 Causing serious physical injury or death by a moving violation; time limitation; penalties; classification; definition.

.010 This offense is a strict liability offense that does not require proof of any culpable mental state.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 4–23 (Ct. App. 2017) (defendant stopped at stop sign and then turned left, hitting scooter and seriously injuring driver and passenger; defendant contended state had to prove he acted knowingly; court viewed language of statute and legislative history and held state did not have to prove any culpable mental state; concurrence noted charge of violating § 28–672 was based on violation of § 28–773, and that § 28–773 required proceeding without "caution," which concurrence equated with negligence).

28–773 Intersection entrance.

.010 The driver of a vehicle shall stop in obedience to a stop sign as required by § 28–855 and then proceed with caution yielding to vehicles that are not required to stop and that are within the intersection or are approaching so closely as to constitute an immediate hazard.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 4–23 (Ct. App. 2017) (defendant was charged with violating § 28–672 based on violation of § 28–773; majority held § 28–672 did not require culpable mental state; concurrence noted § 28–773 required proceeding without "caution," which concurrence equated with negligence).

28–1321(A) Implied consent—Implied consent to submit to test.

.020 Informing a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance" makes any subsequent consent involuntary.

State v. Weakland, 2017 WL 5712585, ¶¶ 5–24 & n.2 (Ct. App. 2017) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, and because state argued good faith exception as soon as possible after *Valenzuela* opinion, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

28–1321(C) Implied consent—Person dead, unconscious, or otherwise incapacitated.

.010 Blood may be taken from a dead, unconscious, or otherwise incapacitated person only if case-specific exigent circumstances exist.

State v. Havatone, 241 Ariz. 506, 389 P.3d 1251, ¶¶ 13–17 (2017) (defendant was conscious at scene of collision, but was airlifted to hospital in Las Vegas; defendant was unconscious at hospital; officer instructed Las Vegas officers to obtain blood sample; because state did not show any exigent circumstances, BAC results should have been suppressed).

.020 When police have probable cause to believe a suspect has committed a DUI, a nonconsensual blood draw is permissible if, under the totality of the circumstances, law enforcement officials reasonably determine they cannot obtain a warrant without a significant delay that would undermine the effectiveness of the testing.

State v. Havatone, 241 Ariz. 506, 389 P.3d 1251, ¶ 18 (2017) (because state did not show any exigent circumstances, BAC results should have been suppressed).

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance.

.010 To invoke the medical blood draw exception set forth in this section, the state must establish the following: (1) probable cause existed to believe the suspect was driving under the influence; (2) exigent circumstances made it impractical for law enforcement to obtain a warrant; (3) medical personnel drew the blood sample for medical reasons; and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 10, 24 (2017) (court cites *State v. Cocio,* 147 Ariz. 277, 709 P.2d 1336 (1985)).

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶ 36 (Ct. App. 2017) (defendant was injured in collision and transported to hospital; nurse informed officer that they would be drawing defendant's blood for medical purposes, and officer requested sample; officer testified that, based on his training as "combat life saver in the military," he was aware of possibility of "intravenous applications of fluids," which would "alter an individual's blood alcohol concentration" and "essentially destroy whatever evidence was available"; thus state met its burden of showing exigent circumstances).

.020 The natural dissipation of alcohol in the bloodstream in not a *per se* exigent circumstance; the state must establish exigency by showing that, under the circumstances specific to the case, it was impractical to obtain a warrant.

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 11–12 (2017) (court disavows anything in *State v. Cocio,* 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985), to the contrary).

.030 Before the state may use as evidence a portion of a blood, urine, or other sample taken for medical purposes, the state is required to prove that (1) the suspect expressly or impliedly consented to medical treatment or (2) medical personnel acted when the suspect was incapable of directing his or her own medical treatment.

State v. Nissley, 241 Ariz. 327, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 2, 20–24 (2017) (at 5:30 p.m., defendant collided head-on into oncoming vehicle, injuring four persons in vehicle and killing pedestrian; defendant was very hostile and combative with medical personnel; court stated that record did not conclusively establish whether defendant was able or competent to direct his own medical treatment and whether medical personnel acted against that right, and so remanded for trial court to apply appropriate standards and determine whether law enforcement personnel lawfully obtained blood sample).

28–1595(A) Failure to stop or provide driver license or evidence of identity—Failure to stop motor vehicle.

.010 In order to violate this section, a person must refuse to stop on the command of an officer who is either in a police car or on foot.

State v. Hernandez, 242 Ariz. 568, 399 P.3d 115, ¶¶ 9–27 (Ct. App. 2017) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly after that, driver turned into private driveway and proceeded into backyard area of residence; when vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, when defendant did not stop in response to emergency lights, defendant violated either A.R.S. § 28–622.01 or § 28–1595(A), so officers properly pursued defendant onto property), ***rev. granted.***

April 16, 2018

ARTICLE II. PRELIMINARY PROCEEDINGS.

RULE 5. PRELIMINARY HEARING.

Rule 5.3(a) Nature of preliminary hearing—Procedure.

5.3.a.020 A magistrate is required to consider a defendant's justification defense, but does not resolve the ultimate question if the evidence is in conflict; that resolution is left to the jurors.

Brailsford v. Foster, 242 Ariz. 77, 393 P.3d 138, ¶¶ 13–28 (Ct. App. 2017) (after hearing state's evidence, magistrate found probable cause; defendant made offer of proof and asked to present testimony from three police officers and expert in law enforcement use of force; magistrate heard from one officer and precluded remaining witnesses, finding evidence and offer of proof was insufficient to rebut finding of probable cause; court held magistrate did not err, and that, because evidence was in conflict whether defendant was justified, proper place to resolve that issue is at jury trial).

ARTICLE III. RIGHTS OF PARTIES.

RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

Rule 6.1(b) Rights to counsel; waiver of rights to counsel—Right to appointed counsel.

6.1.b.090 The trial court is not required to hold an evidentiary hearing on a motion for change of counsel if the motion fails to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communications, or if there is no indication that a hearing would elicit additional facts beyond those already before the trial court.

State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783, ¶¶ 59–61 (2017) (defendant asked for new counsel because he was not able to get along with his appointed attorneys and "could not come to an agreement" with them on trial matters; court held defendant failed to identify specific facts sufficient to require evidentiary hearing).

Rule 6.1(c) Rights to counsel; waiver of rights to counsel—Misconduct during self-representation.

6.1.c.800 A defendant who is incapable of abiding by the basic rules of the court is not entitled to self-representation, thus a trial court may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.

State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783, ¶¶ 44–58 (2017) (defendant was indicted in 2011, and in August 2014, trial court set firm trial date for 12/08/14; at September 2014 hearing, defendant asked to represent himself, which the trial court granted; defendant asked trial court to order that he be provided with word processor, claiming he was not able to draft handwritten motions; trial court granted motion, but later revoked order based on MCSO's policy of providing limited access to such devices for those who were security risks (defendant had 27 disciplinary violations); defendant filed motion to continue trial, which trial court denied, and based on defendant's claim that he was not ready to proceed with trial, reappointed counsel for defendant; court held trial court did not abuse discretion in doing so).

RULE 7. RELEASE.

Rule 7.3(b) Conditions of release—Additional conditions.

7.3.b.020 This section authorizes the trial court to impose pretrial release conditions, but these conditions must be the least onerous that are reasonable and necessary to protect other persons or the community.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 2, 8–18 (2017) (defendant was charged with five counts of public sexual indecency to minor and two counts of public sexual indecency after he allegedly stood nude at his apartment window and masturbated in view of victims (two women and five children) who were walking on sidewalk; court held trial court had authority to impose as release condition that he reside apart from his family and that he have no unsupervised contact with his minor non-victim children).

7.3.b.030 Arizona rules and statutes do not require an evidentiary hearing to impose initial pretrial release conditions or to reconsider the conditions; rather, what is required is an opportunity to be heard on release conditions.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 19–23 (2017) (defendant was timely heard before neutral judge, was assisted by attorney and translator, and was permitted to argue and offer information otherwise inadmissible under evidentiary rules).

7.3.b.040 In order to impose the least onerous release conditions reasonable and necessary to protect the public, the trial court must make an individualized determination, and must make findings and articulate its reasoning for determining that the conditions are the least onerous measures reasonable and necessary to mitigate an identifiable risk of harm.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 24–27 (2017) (because record was inadequate to determine whether trial court's pretrial release conditions complied with newly promulgated rules and were based on individualized determination, court vacated those conditions and directed trial court to consider anew any appropriate pretrial release conditions).

RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS.

Rule 11.4 Disclosure of mental health evidence.

11.4.010 If a defendant raises an insanity or "guilty except insane" defense, the trial court must order disclosure of unredacted copies of any mental-health evaluations.

State v. Hegyi (Rasmussen), 242 Ariz. 415, 396 P.3d 1095, ¶¶ 9–20 (2017) (defendant listed insanity or guilty except insane as defenses, and retained psychologist to testify in support of insanity defense; defendant and state agreed to examination by joint expert; defendant disclosed both reports to state, but redacted any statements defendant made to experts; state then moved to compel disclosure of defendant's redacted statements; court held that, by raising insanity defense, defendant waived privilege against self-incrimination, and thus defendant was required provide unredacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist, but only for matters that went to insanity and not to issues of guilt).

Rule 11.5(a) Hearing and orders—Hearing.

11.5.a.020 The parties may stipulate that the trial court may determine the matter of the defendant's competency based on the expert's reports.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 19–20 (2017) (because parties stipulated that trial court determine defendant's competency based on expert's reports, trial court did not violate defendant's due process rights in not holding competency hearing, even though one expert raised more than "a doubt" about defendant's competency).

ARTICLE IV. PRETRIAL PROCEDURES.

RULE 12. THE GRAND JURY.

Rule 12.1(d) Selection and preparation of grand jurors—Instructions.

12.1.d.010 A prosecutor has a duty to instruct the grand jury on all the law applicable to the facts of the case, including providing instructions on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors' determination whether probable cause exists to indict the defendant.

Cespedes v. Lee, 243 Ariz. 46, 401 P.3d 995, ¶¶ 9–12 (2017) (court concluded prosecutor properly instructed on justification based on defendant's claim that he used physical force to discipline his son).

RULE 13. INDICTMENT AND INFORMATION.

Rule 13.3(a) Joinder—Offenses.

13.3.a.017 If the offense is a single unified offense that can be committed in different ways, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

State v. Millis, 242 Ariz. 33, 391 P.3d 1225, ¶¶ 20–25 (Ct. App. 2017) (defendant was charged with first-degree murder and child abuse; court rejected defendant's contention that charges were duplicative (duplicitous) because some jurors could have found child died from blunt force head trauma while others could have concluded child died from lack of oxygen caused by choking).

RULE 16. PRETRIAL MOTION PRACTICE; OMNIBUS HEARING.

Rule 16.1(d) General provisions—Finality of pretrial determination.

16.1.d.010 Once the trial court has determined a pre-trial issue, that court or another of equal jurisdiction may not reconsider that issue in the same case, except upon a showing of good cause.

State v. Godoy (Whitney), 2017 WL 4250136, ¶¶ 9–12 (Ct. App. 2017) (at close of state's case, trial court granted motion for judgment of acquittal for one count and denied it for other four counts; on February 8, 2017, after matter was submitted to jurors, trial court found juror misconduct and granted defendant's motion for mistrial; on February 16, defendant filed motion asking trial court to reconsider motion for judgment of acquittal; in June 2017, trial court granted motion for reconsideration and dismissed three of remaining four counts; court held that motion for judgment of acquittal was not pre-trial motion, thus Rule 16.1(d) did not apply; further, Rule 16.1(d) provides it applies "[e]xcept . . . as otherwise provided by these rules," and because Rule 20 provides mechanism for renewal of motion for judgment of acquittal, Rule 16.1(d) did not apply to motion for judgment of acquittal).

Rule 16.2(b) Procedure on pretrial motions to suppress evidence—Burden of proof on pretrial motions to suppress evidence.

16.2.b.070 An evidentiary hearings is not required when the trial court need not resolve factual disputes to decide constitutional issues.

State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783, ¶¶ 8–13 (2017) (court rejected defendant's claim that he was entitled to an evidentiary hearing to resolve his contention that statutory aggravating factors do not adequately narrow class of those eligible for death penalty).

Rule 16.6(d) Dismissal of prosecution—Effect of dismissal.

16.6.d.010 A dismissal of prosecution shall be without prejudice, unless the trial court finds that the interests of justice require that the dismissal be with prejudice.

State v. Smith, 242 Ariz. 98, 393 P.3d 159, ¶¶ 22–27 (Ct. App. 2017) (trial court declared mistrial after victim's mother testified about uncharged acts of sexual misconduct, and second trial resulted in mistrial after jurors were unable to reach verdict; before third trial, defendant moved to dismiss charges with prejudice on due process grounds; court held that, considering "seriousness and circumstances" of defendant's alleged offenses (sexual contact and molestation of his 8-year-old granddaughter) and resulting harm, trial court could reasonably conclude state's interest in prosecution outweighed emotional and financial burden successive trials placed on defendant, thus trial court did not abuse discretion in denying motion to dismiss).

ARTICLE VI. TRIAL.

RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

Rule 18.1(a) Trial by jury—By jury.

18.1.a.020 The qualifications to be a juror are as provided by law, and A.R.S. § 21–202(B)(3) requires the trial court to grant a person's recusal request if "[t]he prospective juror is not currently capable of understanding the English language," and this section does not violate a defendant's constitutional rights.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶ 38 (2017) (trial court did not err in granting requests from five potential jurors to be excused).

18.1.a.030 The qualifications to be a juror are as provided by law, and A.R.S. § 21–211 requires the dusqualification of "persons interested directly or indirectly in the matter under investigation."

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 39–43 (2017) (trial court did not err in not excusing, sua sponte, prospective juror who was office assistant employed by Maricopa County Medical Examiner's Office; defendant made no showing that prospective jurors knew any witnesses from Medical Examiner's Office who testified).

Rule 18.4(c) Challenges—Peremptory challenges.

18.4.c.210 If the trial court determines there has been a *Baston* violation, the trial court may either (1) disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, (2) discharge the venire and select a new jury from a panel not previously associated with the case, or (3) impose any other appropriate remedy.

State v. Urrea, 242 Ariz. 518, 398 P.3d 584, ¶¶ 13–25 (Ct. App. 2017) (trial court determined prosecution had improperly struck three potential jurors, so trial court returned those three to the panel; because of location of those jurors on list, only two of then actually served), ***rev. granted.***

Rule 18.5(d) Procedure for selecting a jury—Voir dire examination.

18.5.d.090 If a party requests voir dire, the trial court must permit the party a reasonable time to conduct an examination.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 33–34 (2017) (because trial court posed appropriate follow-up questions to jurors beyond time limit, trial court did not abuse discretion in imposing 5-minute time limit on attorneys' questions to individual jurors).

RULE 20. JUDGMENT OF ACQUITTAL.

Rule 20(a) Judgment of acquittal—Before verdict.

20.a.020 The trial court must rule on a motion for judgment of acquittal at the time it is made and should not reserve ruling on it.

State v. Godoy (Whitney), 2017 WL 4250136, ¶¶ 2–9 (Ct. App. 2017) (at close of state's case, trial court granted motion for judgment of acquittal for one count and denied it for other four counts; on February 8, 2017, after matter was submitted to jurors, trial court found juror misconduct and granted defendant's motion for mistrial; on February 16, defendant filed motion asking trial court to reconsider motion for judgment of acquittal; in June 2017, trial court granted motion for reconsideration and dismissed three of remaining four counts; court held that, because of time that had passed, trial court did not have jurisdiction to rule on renewed motion for judgment of acquittal, and vacated trial court's ruling).

Rule 20(b) Judgment of acquittal—After verdict.

20.b.050 In order to rule on a motion for judgment of acquittal under Rule 20(b) (within 10 days after the verdict was returned), the jurors must have rendered a verdict.

State v. Godoy (Whitney), 2017 WL 4250136, ¶¶ 9–12 (Ct. App. 2017) (at close of state's case, trial court granted motion for judgment of acquittal for one count and denied it for other four counts; on February 8, 2017, after matter was submitted to jurors, trial court found juror misconduct and granted defendant's motion for mistrial; on February 16, defendant filed motion asking trial court to reconsider motion for judgment of acquittal; in June 2017, trial court granted motion for reconsideration and dismissed three of remaining four counts; court held that, because trial court had granted mistrial and jurors had never returned verdict, trial court did not have jurisdiction to rule on renewed motion for judgment of acquittal, and vacated trial court's ruling).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 24. POST-TRIAL MOTIONS.

Rule 24.1(c)(1) Motion for new trial—Weight of the evidence.

24.1.c.110 In assessing whether the verdict was contrary to the weight of the evidence, the trial judge should do the following: (1) Consider all the evidence presented in the light of the judge's experience and training; (2) assess the strength of the evidence, considering the credibili-

ty of the witnesses and conflicting testimony; (3) consider the duration of the trial, the complexity of the issues in the case, and whether the case involved subjects outside the ordinary knowledge of jurors, giving greater scrutiny to more difficult cases; (4) make its assessment with a keen recognition of the importance of the jury's role, with the understanding that the fact that the judge would have reached a different verdict is not enough to grant a new trial; and (5) explain with particularity the reasons why the jury's verdict is against the clear weight of the evidence.

State v. Fischer, 242 Ariz. 44, 392 P.3d 488, ¶¶ 1, 23–24 (2017) (based on this standard, court concluded trial court properly granted new trial and that court of appeals exceeded proper scope of deferential appellate review by independently reweighing evidence rather than determining if substantial evidence supported trial court's ruling).

24.1.c.140 In reviewing a trial court's decision to grant a new trial, the appellate court must inquire whether substantial evidence exists to support the trial court's determination, and if such evidence exists, then the order is within the sound discretion of the trial court and should be affirmed.

State v. Fischer, 242 Ariz. 44, 392 P.3d 488, ¶¶ 1, 26–31 (2017) (based on this standard, court concluded trial court properly granted new trial and that court of appeals exceeded proper scope of deferential appellate review by independently reweighing evidence rather than determining if substantial evidence supported trial court's ruling).

Rule 24.1(c)(2) Motion for new trial—Prosecutorial misconduct.

24.1.c.230 To prove prosecutorial misconduct, a defendant must show (1) the prosecutor's actions were improper, and (2) a reasonable likelihood exists that the misconduct could have affected the jurors' verdict, thereby denying the defendant a fair trial.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 90–97 (2017) (although prosecutor inaccurately stated what DNA evidence and other evidence showed, defendant failed to show reasonable likelihood that comments affected verdict).

24.1.c.290 The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶ 103 (2017) (although in several instances prosecutor inaccurately stated what evidence showed, defendant failed to show prosecutor acted with indifference, or with specific intent to prejudice defendant).

RULE 26. JUDGMENT, PRE-SENTENCE REPORT, PRE-SENTENCE HEARING, SENTENCE.

Rule 26.1(a) Definitions; scope—Judgment.

26.1.a.030 Although the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court, restitution is not part of the sentence, thus the trial court may retain jurisdiction to enter an order of restitution at a later date.

State v. Grijalva, 242 Ariz. 72, 392 P.3d 516, ¶¶ 2–14 (Ct. App. 2017) (trial court imposed sentence in October 2012 and stated it retained jurisdiction over restitution; in March 2014; trial court entered order of restitution; court held trial court properly retained jurisdiction to do so).

Rule 26.10(b) Pronouncement of judgment and sentence—Pronouncement of sentence.

26.10.b.037 Although the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court, restitution is not part of the sentence, thus the trial court may retain jurisdiction to enter an order of restitution at a later date.

State v. Grijalva, 242 Ariz. 72, 392 P.3d 516, ¶¶ 2–14 (Ct. App. 2017) (trial court imposed sentence in October 2012 and stated it retained jurisdiction over restitution; in March 2014; trial court entered order of restitution; court held trial court properly retained jurisdiction to do so).

Rule 26.16(a) Entry of judgment and sentence; warrant of authority to execute sentence—Entry of judgment and sentence.

26.16.a.040 Although the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court, restitution is not part of the sentence, thus the trial court may retain jurisdiction to enter an order of restitution at a later date.

State v. Grijalva, 242 Ariz. 72, 392 P.3d 516, ¶¶ 2–14 (Ct. App. 2017) (trial court imposed sentence in October 2012 and stated it retained jurisdiction over restitution; in March 2014; trial court entered order of restitution; court held trial court properly retained jurisdiction to do so).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

RULE 31. APPEAL FROM SUPERIOR COURT.

Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

31.13.c.fe.040 If the defendant **did not** object at trial, the appellate court will review only for **fundamental error,** and **will grant** relief if the defendant proves fundamental, prejudicial error.

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 9–23 (2017) (in response to juror's question, officer related answer defendant had made while in custody and prior to any *Miranda* warnings; state did not dispute that introducing statement was error; although defendant's attorney had objected to state's introduction of statement, defendant's attorney did not object when trial court posed question to officer, thus court concluded defendant did not preserve issue for review and engaged in fundamental error analysis; court concluded admission of statement was neither fundamental error nor prejudicial).

RULE 32. OTHER POST-CONVICTION RELIEF.

Rule 32.1 Scope of remedy.

32.1.050 This rule does not give a defendant the right to challenge a trial court's denial of a motion to withdraw from a guilty plea.

State v. Leyva, 241 Ariz. 521, 389 P.3d 1266, ¶ 9 (Ct. App. 2017) (because defendant claimed his plea was involuntary and thus in violation of U.S. Constitution, that was cognizable claim under Rule 32).

Rule 32.1(a) Scope of remedy—Constitutional violation.

32.1.a.020 To state a colorable claim of ineffective assistance of counsel, the defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.

State v. Leyva, 241 Ariz. 521, 389 P.3d 1266, ¶¶ 18–22 (Ct. App. 2017) (defendant pled guilty on 1/14, and on 2/11, filed motion to withdraw claimed his plea was involuntary because his family members pressured him into pleading guilty; defendant claimed he wanted to withdraw from plea immediately after leaving courtroom after entering plea, and that his attorney provided ineffective assistance of counsel by "encouraging him to wait a little while to see if he would feel differently"; court held defendant failed to show attorney's conduct was deficient, and failed to show trial court would have granted motion to withdraw from plea if it had been filed sooner).

32.1.a.050 A defendant may challenge a plea based on a claim that it was involuntary and thus in violation of U.S. Constitution.

State v. Leyva, 241 Ariz. 521, 389 P.3d 1266, ¶¶ 10–17 (Ct. App. 2017) (defendant claimed his plea was involuntary because his family members pressured him into pleading guilty; court held that claim did not entitle defendant to relief).

Rule 32.1(f) Scope of remedy—Failure to appeal.

32.1.f.010 This section gives a defendant the right to file a delayed appeal or a delayed petition for post-conviction relief if the failure to file in a timely manner was without fault in the defendant's part, which occurs when (1) the defendant was unaware of the right to petition for post-conviction relief or of the time within which a notice of post-conviction relief must be filed, or (2) that the defendant intended to challenge the court's decision but defendant's attorney or someone else interfered with the timely filing of a notice

State v. VanDerMeulen, 243 Ariz. 233, 404 P.3d 261, ¶¶ 7–10 (Ct. App. 2017) (defendant contended reason for untimely filing was that "there were delays in his receipt of his case file and he thus lacked the opportunity to review it," but made no allegation of either ground stated in rule, thus trial court err in dismissing defendant's notice).

Rule 32.5 Contents of petition.

32.5.030 This rule, which that the petition shall be accompanied by a declaration by the defendant stating under penalty of perjury that the information contained is true to the best of the defendant's knowledge and belief, does not mention, let alone require, competence, nor does it provide any right to effective communication between Rule 32 counsel and the client, thus this rule does not require a trial court to determine whether the defendant is competent before proceeding with and ruling on the post-conviction relief petition, but the trial court, in its discretion, may order a competency evaluation if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain claims.

Fitzgerald v. Myers, 243 Ariz. 84, 402 P.3d 442, ¶¶ 21–24 (2017) (prior to trial, defendant was found incompetent and then restored to competency; during penalty phase, defendant was again found incompetent and again restored to competency; during post-conviction relief proceedings, defendant's expert opined defendant was not competent; court held trial court correctly denied defendant's request for competency hearing).

Rule 32.6(c) Additional pleadings; summary disposition; amendments—Summary disposition.

32.6.c.020 The trial court in a petition for post-conviction relief is not required to conduct an *Anders*-type review of the proceedings.

State v. Chavez, 243 Ariz. 313, 407 P.3d 85, ¶¶ 2–18 (Ct. App. 2017) (court follows procedure set forth by Arizona Supreme Court, and declines to follow procedure set forth by U.S. District Court requiring *Anders*-type review).

Rule 32.8(a) Evidentiary hearing—Evidentiary hearing.

32.8.a.010 A defendant is entitled to a hearing to determine issues of material fact.

State v. Martinez, 243 Ariz. 110, 111, 402 P.3d 995, 996 (2017) (defendant was found competent in Spring 2014; defendant pled guilty in September 2014 and was sentenced October 2014; defendant filed petition for post-conviction relief with statement from doctor who opined defendant was more likely than not incompetent at time of plea; court held trial court erred in not holding evidentiary hearing).

U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

us.a4.ss.xp.010 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **first** of which is whether the individual, by conduct, has exhibited an actual (subjective) expectation of privacy.

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 21–26 (Ct. App. 2017) (defendant was in hospital room with door not completely closed and talking loud enough to be heard in hallway; officer was in hallway for proper purpose; court held defendant had no reasonable, objective expectation of privacy in his statements to medical personnel).

us.a4.ss.xp.020 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **second** of which is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

State v. Peltz, 242 Ariz. 23, 391 P.3d 1215, ¶¶ 21–27 (Ct. App. 2017) (defendant was in hospital room with door not completely closed and talking loud enough to be heard in hallway; officer was in hallway for proper purpose; court held defendant had no reasonable, objective expectation of privacy in his statements to medical personnel, and even if he had subjective expectation of privacy, it was not one that society would recognize as reasonable).

U.S. Const. amend. 4 Search and seizure—Investigative stop and reasonable suspicion.

us.a4.ss.is.030 An officer may frisk an individual only when the officer possesses (1) a reasonable suspicion that the person to be searched has engaged in, or is about to engage in, criminal activity and (2) a reasonable belief that the person is armed and dangerous; and reasonable suspicion in turn requires a particularized and objective basis for the suspicion.

State v. Primous, 242 Ariz. 221, 394 P.3d 646, ¶¶ 11–24 (2017) (officers were looking for person who had outstanding warrants; area was apartment complex in neighborhood known for violent crimes and that person frequented area, carried weapons, and sold drugs and weapons; officers approached group of four individuals including defendant, who did not match description of person for whom officer were looking; one member of group ran, and officers began frisking others, finding drugs on one person and then finding drugs on defendant; court held officers did not have reasonable suspicion to frisk defendant, and fact that one person ran and another possess drugs did not give officers reasonable suspicion to do so).

U.S. Const. amend. 4 Search and seizure—Arrest within the home without a warrant.

us.a4.ss.aih.010 An officer may not arrest a person in a home without a warrant unless there is consent or exigent circumstances, which include (1) response to an emergency, (2) hot pursuit, (3) possibility of destruction of evidence, (4) possibility of violence, (5) knowledge that the subject is fleeing or attempting to flee, and (6) substantial risk of harm to the persons involved or to the law enforcement process if the officers must wait for a warrant.

State v. Hernandez, 242 Ariz. 568, 399 P.3d 115, ¶¶ 9–27 (Ct. App. 2017) (officers determined vehicle's insurance had expired, followed vehicle, and turned on emergency lights; shortly thereafter, driver turned into private driveway and proceeded into backyard area of residence; when vehicle stopped, officer approached, smelled marijuana, and ultimately arrested defendant; court held that, when defendant did not stop in response to emergency lights, defendant violated either A.R.S. § 28–622.01 or § 28–1595(A), so officers properly pursued defendant onto property), ***rev. granted.***

U.S. Const. amend. 4 Search and seizure—Consent.

us.a4.ss.cs.040 Once officers stop a person for a traffic violation and resolve that violation, if the person is then free to leave, the officers may ask the person for consent to search, and as long as there is no force or show of authority used, there is no unlawful detention, and the consent will be considered voluntary.

State v. Urrea, 242 Ariz. 518, 398 P.3d 584, ¶¶ 6–12 (Ct. App. 2017) (officer stopped defendant for failure to signal when changing lanes; before completing traffic stop, officer approached defendant's vehicle second time to check VIN number and noticed items in vehicle suggesting that defendant might be transporting drugs; officer asked defendant if he could search vehicle, and defendant agreed and signed consent form; court held office did not improperly prolong stop, and subsequent consent was valid), ***rev. granted.***

U.S. Const. amend. 4 Search and seizure—Exclusionary rule and its application.

us.a4.ss.exap.020 The good-faith exception to the exclusionary rule does not apply when the police conduct is not objectively reasonable.

State v. Dean, 241 Ariz. 387, 388 P.3d 24, ¶¶ 20–31 (Ct. App. 2017) (because allegation that defendant had committed child molestation at another location 18 months earlier did not establish probable cause that defendant had child pornography on his computer, officers were not authorized to search computer based on that warrant, and because warrant was not sufficiently particular, police conduct in searching computer was not objectively reasonable).

us.a4.ss.exap.030 If the police conduct a search in compliance with binding precedent later overruled, because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

State v. Weakland, 2017 WL 5712585, ¶¶ 5–24 & n.2 (Ct. App. 2017) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, and because state argued good faith exception as soon as possible after *Valenzuela* opinion, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

us.a4.ss.exap.040 If the state does not make a claim at trial that the officer acted in conformity with the law existing at the time of the search, the state will be deemed to have waived that issue on appeal.

State v. Weakland, 2017 WL 5712585, ¶¶ 5–24 & n.2 (Ct. App. 2017) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, and because state argued good faith exception as soon as possible after *Valenzuela* opinion, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

U.S. Const. amend. 5 Double jeopardy.

us.a5.dj.210 If the trial court orders a mistrial *sua sponte* or over the defendant's objection, double jeopardy precludes a retrial unless there was a manifest necessity for granting the mistrial.

State v. Dickinson, 242 Ariz. 120, 393 P.3d 461, ¶¶ 2–24 (Ct. App. 2017) (defendant was charged with theft of mountain bike; in opening statement, defendant's attorney noted serial number on bike defendant sold on Craigslist did not match serial number of bike that had been stolen; during cross-examination of buyer, defendant's attorney learned buyer's wife had recently given police note on which she had written two numbers that theft victim said had been on bike, one of which matched number on bike buyer had purchased; buyer's wife apparently had note for 3 years before giving it to police, and neither prosecutor nor defendant's attorney knew about note; trial court discussed situation with attorneys, and defendant's attorney made clear he preferred to proceed with same jury, without any further reference to note, and prosecutor did not request granting mistrial; trial court, however, granted mistrial, and defendant was tried and convicted; court held there was no manifest necessity to grant mistrial, thus double jeopardy precluded subsequent conviction).

U.S. Const. amend. 5 Double jeopardy—Collateral estoppel and res judicata.

us.a5.dj.ce&rj.040 Although collateral estoppel may apply in criminal proceedings, even when the issue was decided in a prior civil action, that doctrine is not favored in criminal cases and should be applied sparingly.

Crosby-Garbotz v. Fell, 2017 WL 6629521, ¶¶ 9–29 (Ct. App. 2017) (state charged defendant with child abuse based on injuries to child; in separate dependency action, juvenile court found defendant did not abuse child in question and dismissed dependency petition that was based solely on that alleged abuse; court was concerned that permitting collateral estoppel doctrine to apply in this context could cause state to forego dependency proceedings because of possibility it would be precluded from relitigating underlying issues in criminal proceeding, with potential effect of further endangering children, or that state might be compelled to present its entire criminal case in dependency proceeding, which could unnecessarily complicate and delay adjudication, placing undue burden on juvenile court system; court therefore concluded bright-line rule against applying collateral estoppel in this context best served litigants, their attorneys, courts of this state, and public).

U.S. Const. amend. 5 Self-incrimination—Voluntariness.

us.a5.si.vol.100 In order for a confession to be involuntary within the meaning of the Due Process Clause, the officers must have exercised **coercive pressure** that was not dispelled; thus if the officers made an expressed or implied **promise** of a benefit or leniency, and the defendant's reliance on the promise overcame the defendant's will not to confess, the confession **will be deemed involuntary.**

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 60–61 (2017) (defendant contended officer's statement, "I don't think in the long run it's really going to make too much of a difference in—in your custody time, you're not going to get out" was promise of leniency that made his subsequent statements involuntary; court disagreed and concluded officer's observation was clearly his own opinion and did not suggest he had ability to affect defendant's sentence).

U.S. Const. amend. 5 Self-incrimination—*Miranda.*

us.a5.si.mir.080 If the police are required to give the *Miranda* warnings, the police must advise the suspect four things: (1) the suspect has the right to remain silent; (2) anything the suspect says may be used against the suspect in a court of law; (3) the suspect has the right to the presence of an attorney both before and during questioning; and (4) if the suspect cannot afford an attorney, one will be appointed prior to any questioning if the suspect so desires.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 21–26 (2017) (in translating *Miranda* rights into Spanish, although detective once translated "attorney" as "licenciado," which primarily means university graduate and secondarily lawyer, rather than "abogado," which means attorney, detective used "abogado" several times, and defendant said he understood his *Miranda* rights before detective used word "licenciado," totality of circumstances showed *Miranda* warnings were adequate).

U.S. Const. amend. 5 Self-incrimination—*Miranda*—Waiver.

us.a5.si.mir.wav.010 As long as the police read the *Miranda* warnings to the defendant in a manner that would lead a reasonable person to understand the rights and do not engage in any improper actions, the police comply with the *Miranda* requirements, and the defendant's limitations do not make the waiver involuntary.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 27–29 (2017) (even though defendant suffered from intellectual disability, was poorly educated, and had limited knowledge of American legal system, defendant's actions showed he understood his *Miranda* rights).

us.a5.si.mir.wav.080 Although a violation of the Vienna Convention on Consular Relations might have a bearing on whether a confession was voluntary, it would have no bearing on whether the defendant had been appraised of the right to counsel and whether the defendant made a knowing and voluntary waiver of that right.

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798, ¶¶ 30–32 (2017) (court rejected defendant's contention that violation of VCCR made his waiver of *Miranda* rights unknowing and unintelligent).

us.a5.si.mir.wav.090 If a person is in custody, has received the *Miranda* warnings, and is subject to custodial interrogation, the person must clearly and unambiguously invoke **the right to remain silent,** which must be judged from the perspective of a reasonable police officer in the circumstances.

State v. Rushing, 243 Ariz. 212, 404 P.3d 240, ¶¶ 57–59 (2017) (during questioning, defendant said "I'm not sure I should say anything; I don't know" and "I probably should not talk about [the details]"; court held defendant's statements were not unambiguous invocations of his right to remain silent).

U.S. Const. amend. 5 Self-incrimination—Comment on right not to testify.

us.a5.si.cmt.010 As long as the prosecutor's statement, question, or argument does not call to the attention of the jurors the failure of the defendant to testify, the prosecutor may discuss the fact that the defendant has given, or has not given, certain information, or has not called certain witnesses.

State v. Farnsworth, 241 Ariz. 486, 389 P.3d 88, ¶¶ 9–12 (Ct. App. 2017) (defendant was convicted of sexual exploitation of minor based on child pornography found on his computer; in final argument, defendant's attorney discussed fact that police had not investigated certain other person who had access to computer, and prosecutor argued that defense had subpoena power and thus could have brought that person to court; because evidence had been presented about that person living in same house as defendant, and because prosecutor emphasized that state had burden of proof, prosecutor's argument was not error).

U.S. Const. amend. 6 Counsel—Ineffective assistance of counsel; Standards.

us.a6.cs.iac.001 To establish a claim of ineffective assistance of counsel, the defendant must show counsel's representation fell below an objective standard of reasonableness, focusing on the practice and expectations of the legal community, and must show that counsel's performance was not reasonable under prevailing professional norms.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶ 5 (2017) (cites *Hinton v. Alabama*).

us.a6.cs.iac.012 To establish a claim of ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶ 6 (2017) (cites *Strickland v. Washington*).

us.a6.cs.iac.050 In ruling on a claim of ineffective assistance of counsel, the trial court must make specific findings of fact, and if the trial court fails to do so, the reviewing court is not required to give deference to the trial court's rulings, and must instead review the record itself.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶ 3 (2017) (trial court found ineffective assistance of counsel and granted defendant's petition for post-conviction relief; because trial court made few specific findings and failed to connect them to its conclusions on may issues presented, supreme court conducted its own review and denied defendant's requested relief).

U.S. Const. amend. 6 Counsel—Ineffective assistance of counsel; Performance.

us.a6.cs.iac.110 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's actions were deficient, and under this standard, counsel need not make unnecessary motions or objections or pursue defenses that have no chance of success.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 46–51 (2017) (defendant contended counsel's failure to object to Dr. Keen's autopsy testimony other act evidence was ineffective assistance of counsel; court found Dr. Keen properly relied on report of examiner who performed autopsy, thus Dr. Keen's autopsy testimony was admissible, so there was no basis to object).

us.a6.cs.iac.120 The determination of which defense to pursue is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 22–26 (2017) (defendant contended counsel's failure to obtain brain imaging scans was ineffective assistance of counsel; court found this was strategic decision).

us.a6.cs.iac.130 The determination of the extent and type of cross-examination of a witnesses is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 9–21 (2017) (defendant contended counsel's failure to cross-examine state's rebuttal witness was ineffective assistance of counsel; court found this was strategic decision).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 53–55 (2017) (defendant contended counsel's failure to cross-examine defendant's half-brother was ineffective assistance of counsel; court found this was strategic decision).

us.a6.cs.iac.135 The determination of what objections to make is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 31–33 (2017) (defendant contended failure to challenge aggravating factors was ineffective assistance of counsel; court found strategic decision).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 34–36 (2017) (defendant contended failure to object to other act evidence was ineffective assistance of counsel; court found this was strategic decision).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 37–42 (2017) (defendant contended failure to object to rebuttal evidence was ineffective assistance of counsel; court found this was strategic decision).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 43–45 (2017) (defendant contended failure to object to references to serial killers was ineffective assistance of counsel; court found strategic decision).

us.a6.cs.iac.140 The determination of which instructions to request is a strategic or tactical decision, and will support a claim of ineffective assistance of counsel only if there was no reasonable basis for the action taken.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 56–58 (2017) (defendant contended failure to request instructions on each of 83 individual mitigating factors was ineffective assistance of counsel; court found counsel's decision to group them into 12 categories and request instruction of each of those 12 categories was strategic decision).

us.a6.cs.iac.160 The relative inexperience of a second-chair defense attorney in a capital trial does not in itself constitute ineffective assistance of counsel, especially when the first-chair attorney was experienced, and a defendant facing the death penalty does not have a per se constitutional right to the assistance of two attorneys.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 62–64 (2017) (although second-chair defense attorney had never done a trial, not even a misdemeanor, first-chair defense attorney was experienced criminal defense attorney who had been involved in capital cases.

us.a6.cs.iac.180 A contention that counsel's failure to take certain actions will not support a claim of ineffective assistance of counsel if counsel did take that action.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 27–30, 59–61 (2017) (defendant contended counsel's failure to present sufficient mitigation was ineffective assistance of counsel; court found counsel adequately investigated mitigation, and to extent counsel only presented certain mitigation, this was strategic decision).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶ 52 (2017) (defendant contended counsel's failure to object to testimony of victim's sister was ineffective assistance of counsel; court noted counsel did object by unsuccessfully moving to preclude this testimony).

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 65–68 (2017) (defendant contended failure to conduct adequate voir dire was ineffective assistance of counsel; court found voir dire adequate).

us.a6.cs.iac.185 The general rule is that several non-errors and harmless errors cannot add up to one reversible error, thus the Arizona Supreme court has not recognized the cumulative error doctrine for ineffective assistance of counsel claims.

State v. Pandeli, 242 Ariz. 175, 394 P.3d 2, ¶¶ 69–72 (2017) (court rejected defendant's claim that, even if court did not find deficient performance on any one individual issue, multiple instances of ineffective assistance of counsel cumulatively prejudiced him; court noted that "no aggregate ineffective assistance of counsel occurred here").

Arizona Constitution

Ariz. Const. art. 2, sec. 2.1(A)(4). Victim's rights — Right to be heard.

az.2.2.1.a.4.020 The victim has the right to be heard at any proceeding where the defendant's post-arrest release is being considered.

State v. Wein (Sisco), 242 Ariz. 372, 396 P.3d 608, ¶¶ 1–11 (Ct. App. 2017) (defendant charged with sexual assault, child molestation, and sexual conduct with minor; state wanted to present victim's statement through representative; trial court held it would not consider victim's statement unless defendant had opportunity to cross-examine victim; court held that "victim's statements, despite being hearsay, are permitted and must be considered in a *Simpson II* hearing").

Ariz. Const. art. 2, sec. 22. Bailable offenses.

az.2.22.010 To the extent art. 2, § 22(A)(1) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only for an offense that inherently demonstrates future dangerousness, and for an offense that does not inherently demonstrate future dangerousness, only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.

Simpson v. Miller, 241 Ariz. 341, 387 P.3d 1270, ¶¶ 14, 24–31 (2017) (defendants were charged with sexual conduct with minor under age of 15, which is an offense that does not inherently demonstrate future dangerousness).

Chantry v. Astrowsky, 242 Ariz. 355, 395 P.3d 1114, ¶¶ 1–5 (Ct. App. 2017) (defendant was charged with child molestation).

az.2.22.020 A defendant may be denied release for an offense that inherently demonstrates future dangerousness, and sexual assault is an offense that inherently demonstrates future dangerousness.

State v. Wein (Henderson), 242 Ariz. 352, 395 P.3d 1111, ¶¶ 1–9 (Ct. App. 2017) (defendants were each charged with sexual assault; trial courts held state failed to prove defendants were ongoing dangers to community and set bail; court held "[s]exual assault remains a non-bailable offense" and therefore granted relief to state), ***rev. granted.***

az.2.22.140 This section authorizes the trial court to impose pretrial release conditions, but these conditions must comply with Arizona Rules of Criminal Procedure 7.2(a) and 7.3(b), which require release conditions to be the least onerous that are reasonable and necessary to protect other persons or the community.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 2, 8–18 (2017) (defendant was charged with five counts of public sexual indecency to minor and two counts of public sexual indecency after he allegedly stood nude at his apartment window and masturbated in view of victims (two women and five children) who were walking on sidewalk; court held trial court had authority to impose as release condition that he reside apart from his family and that he have no unsupervised contact with his minor non-victim children).

az.2.22.150 Arizona rules and statutes do not require an evidentiary hearing to impose initial pretrial release conditions or to reconsider the conditions; rather, what is required is an opportunity to be heard on release conditions.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 19–23 (2017) (defendant was timely heard before neutral judge, was assisted by attorney and translator, and was permitted to argue and offer information otherwise inadmissible under evidentiary rules).

az.2.22.160 In order to impose the least onerous release conditions reasonable and necessary to protect the public, the trial court must make an individualized determination, and must make findings and articulate its reasoning for determining that the conditions are the least onerous measures reasonable and necessary to mitigate an identifiable risk of harm.

Samiuddin v. Nothwehr, 243 Ariz. 204, 404 P.3d 232, ¶¶ 24–27 (2017) (because record was inadequate to determine whether trial court's pretrial release conditions complied with newly promulgated rules and were based on individualized determination, court vacated those conditions and directed trial court to consider anew any appropriate pretrial release conditions).

Ariz. Const. art. 2, sec. 23. Trial by jury—Right to a jury.

az.2.23.rj.020 To determine whether the offense mandates a jury trial, the court should consider two things: **First,** under Article 2, section 23, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 13–17 (Ct. App. 2017) (defendant charged with causing serious physical injury or death by moving violation; defendant contended there was common law antecedent offense of operating motor vehicle so as to endanger any property or individual, that was jury eligible; court noted actual death or injury was not required under that offense, while it was under § 28–672, so charged offense was not jury eligible).

az.2.23.rj.060 To determine whether the offense mandates a jury trial, the court should consider two things: **Second,** under Article 2, section 24, the severity of the possible penalty; if the offense is classified as a misdemeanor punishable by no more than 6 months incarceration, the court will presume the offense is one for which the defendant is not entitled to a jury trial.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 18–19 (Ct. App. 2017) (defendant was charged with causing serious physical injury or death by moving violation, which had maximum sentence of 30 days; defendant failed to show any additional consequences that would entitle him to jury trial).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Trial by jury.

az.2.24.rj.010 To determine whether the offense mandates a jury trial, the court should consider two things: **First,** under Article 2, section 23, whether the offense is an offense, or shares substantially the similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 13–17 (Ct. App. 2017) (defendant charged with causing serious physical injury or death by moving violation; defendant contended there was common law antecedent offense of operating motor vehicle so as to endanger any property or individual, that was jury eligible; court noted actual death or injury was not required under that offense, while it was under § 28–672, so causing charged offense was not jury eligible).

az.2.24.rj.050 To determine whether the offense mandates a jury trial, the court should consider two things: **Second,** under Article 2, section 24, the severity of the possible penalty; if the offense is classified as a misdemeanor punishable by no more than 6 months incarceration, the court will presume the offense is one for which the defendant is not entitled to a jury trial.

Phoenix City Pros. Off. v. Nyquist (Hernandez-Alejandro), 243 Ariz. 227, 404 P.3d 255, ¶¶ 18–19 (Ct. App. 2017) (defendant was charged with causing serious physical injury or death by moving violation, which had maximum sentence of 30 days; defendant failed to show any additional consequences that would entitle him to jury trial).

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